90-4140

NO.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MUMTAZ BANO KHAN,

Petitioner

v.

JIMMY R. JENKINS, JOHN H. CARSON,
MARION D. THORPE,
ELIZABETH CITY STATE UNIVERSITY,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the Petitioner had failed to produce a prima facie case of racial and national origin discrimination in pay, under Title VII and Sec 42 USC 1983, because the Petitioner's job position title was different from those of the comparable individuals in the majority group, whose work and position were otherwise substantially similar.

2. Does a prima facie case of race and national origin discrimination in pay, based on comparison of the Petitioner's pay with those of other individuals in the majority group, require identity of job, including title, or is substantial similarity sufficient?

3. Was the Petitioner denied essential discovery, when she was not given the race, seniority of faculty members, and

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only incomplete, unreliable, and unclear information about their salary and rank; no information about their work assignments, and little information about their qualifications; when the only discovery allowed her, was during a time she was unrepresented by counsel?

4. Did the denial of discovery, after the Petitioner had obtained counsel, constitute a denial of her right to counsel?

5. Was a statistical analysis, comparing the salary of blacks with non-blacks (Asians and whites), for that reason, inadmissible in evidence and without probative value, to prove racial discrimination in the Petitioner's case?

6. Does the evidence, relating to the pay the Petitioner received in May 1978, part of the 77-78 academic year, prove racial discrimination in pay against

her, under Title VII and Sec 1983?

7. Did the Petitioner carry her burden of proof, in her Title VII and Sec 1981 actions, when all the evidence in the record is considered?

IN THE SUPREME COURT OF THE UNITED STATES

October Term

MUMTAZ BANO KHAN Petitioner.

vs

JIMMY R. JEFFRIES, JOHN H. CARSON,
MARION D. THORPE,
ELIZABETH CITY STATE UNIVERSITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Murtaz Bano Kahn, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United State Court of Appeals for the Fourth Circuit, entered in the above case on June, 5, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported and is printed in Appendix A, hereto at p. 3. The order of the United States Court of Appeals for the Fourth Circuit, on rehearing is printed in Appendix A infra, p. 1.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit,

Appendix A, infra p. 3, was entered on the 5th day of June 1990. A timely Petition for Rehearing was denied on June 27 1990, Appendix A, p. 1. The jurisdiction of this Court is invoked under 28 USC Sec 1254(1), 28 USC 1651.

STATUTES INVOLVED

42 USC 2000e-5(e)

42 USC 2000e-2

42 USC Sec 1983

Which are set out in pertinent part in the Appendix infra 25.

STATEMENT OF THE CASE

The Petitioner filed this suit on December 30, 1982, in the U.S. District Court of the Eastern District of N.C., alleging as amended, racial and national origin, discrimination in employment, in violation of Title VII, 42 USC Sec 1983 and 42 USC Sec 1981. The District Court dismissed all her claims on Statute of Limitaions grounds. The Court of Appeals for the 4th Circuit, in a decision rendered March 19, 1987, remanded her case for trial, on her claim of racial and national origin discrimination in pay and work assignments, which it held were continuing in nature and not time-barred.

The Petitioner, Mumtaz Bano Khan, is an Asian American and a United States Citizen of Pakistani origin. The Respondents are Elizabeth City State University and individual members of its administration.

Elizabeth City State University is a North Carolina, state institution, and has an overwhelmingly black majority in its administrative positions, faculty and student body.

In August 1971, she was hired by the Defendant, Elizabeth City State University (ECSU), as an instructor, in its Business and Economics Department. At that time, she had a BA degree and a Masters of Business Administration.

In July 1977, the Defendant, Jimmy Jenkins, became vice-chancellor for academic affairs, in charge of setting salaries for the faculty. John Carson became Business and Economics Department chairman in September 1977.

The Petitioner and her husband complained of discrimination in pay against Asians, in 1978. Thereafter, an Assistant recommended to Jenkins, in a letter (Pl Ex

81, App 58) that they be fired, and the following year the Plaintiff was given a terminal contract. Her husband was removed as the Biology Department Chairman, after he complained of discrimination (Pl Ex 81, Tr 175-177, L3).

The Petitioner testified she talked with Dr. Carson, her department chairman, in early 1978, about being promoted and he assured her he would recommend her promotion to assistant professor and tenure (App 161-162). Shortly thereafter, she received a letter from Dr. Jenkins, denying the promotion and changing her from an instructor to a lecturer in the coming year. The contract accompanying the letter, contained a salary lower than she was currently making. When she talked with Carson about it, he told her Jenkins would not accept his recommendation, and the administration had a policy

of getting rid of the Asians in the university, and replacing them with blacks (Tr 48). The number of Asians in the Business and Economics Department went from one to five in a few years. Four of the five Asians who taught in the department during the academic years 75-79, were terminated by September 1980 (Tr 47). The five were R.R. Patel, P.M. Patel, Hamif Hafiz, Saeed Nazami, and the Petitioner (Tr 24-25, 48-49). Professor Nazami, an Asian, testified he was non-renewed and was told, by Mr. Carson, that positions are held open - that is, occupied by non-tenured staff, until the "right" person comes up (Tr 21), and that a black male by the name of Penny had been selected to replace him, and it was useless to fight it (Tr 19).

After her complaint and a faculty committee hearing, Jenkins increased the

amount of her salary (Pl Ex 151). Feeling the denial of promotion and her removal from the tenure tract was discriminatory, she filed an EEOC charge concerning them, in 1977. In early 1979 the Petitioner ws told she would receive a terminal contract for 79-80. In May 1980, during her last month of employment, she filed a second EEOC charge, concerning her termination. Her claims, based on the denial of promotion, tenure, and termination, were held barred on statute of limitation grounds, by the Court of Appeals, in March 1987.

The evidence also showed the following:

In the academic year 1976-77, the Petitioner's salary was $10,431. (Pl Ex 241) and Evelyn Roberts, a Black, received $13,125. Both were members of the same department; both were instructors; both had Masters degrees. The Petitioner had an MBA

and Roberts had a Masters in Business & Office Procedures. Roberts was hired one year after the Petitioner The standard deviation between the salaries of Blacks and the lower salary of Asians in the University for 1976-77 was 3.9 (Pl Ex 241). The $2,694. difference between the Petitioner's salary and that of the similarly situated Black, Evelyn Roberts, in the 1976-77 year, plus the 3.9 standard deviation differences between the salary of Blacks and Asians, the Petitioner asserts, proved conclusively that racial discrimination existed in that year, in setting the Petitioner's pay.

In the year 1977-78, the Petitioner's salary was $12,474. (Pl Ex 241), and Evelyn Robert's was $14,300. - a difference of $1,826.. Also in 1977-78, there were 3.12 standard deviations between the salaries of Blacks and Asians. These figures conclu-

sively show there was racial discrimination against the Petitioner, in setting her salary in those years, 1976-77 and 1977-78.

Jenkins and Carson fixed salaries for the year 1977-78, and following. Jenkins testified he became responsible for fixing salaries on July 1, 1977. (Tr 159, L24), and testified contracts, setting salaries, are signed in July and August, but raises may be given after that (Tr 179, L12).' Also, Plaintiff's Ex 9, dated October 31, 1977, from Jenkins, says a contract is enclosed and that the Petitioner may receive raises, in coming months. Carson testified he became department chairman in September 1977 (Tr 203) and, as such, recommended initial salaries and annual merit raises (Tr 204-205).

Thus, evidence for the year 1977-78 shows conclusively that Jenkins discriminated by race against her, by setting the

Petitioner's salary in that year. The Opinion of the Court of Appeals does not discuss the evidence for the year 1977-78, or prior years, and erred in stating that Jenkins did not become responsible for salaries, until the academic year 1978-79.

On July 31, 1979, Mr. Jenkins, the vice-chancellor, wrote the Petitioner, telling her that her appointment for the coming year (1979-80) would be a terminal appointment. The Petitioner reluctantly accepted the terminal contract, under which her employment with ECSU would end, on May 20, 1980.

The Petitioner's last day of employment was May 20, 1990. On May 8, 1980, the Petitioner filed a charge of discrimination with the EEOC.

In 1986, the District Court dismissed all of the Petitioner's 1983 and Title VII claims, as being time-barred. On appeal to

the Fourth Circuit, the case was remanded for trial, on the discrimination in pay and work assignments claims.

In May 1988, after remand, the Petitioner asked for further discovery, which was denied by the District Court, and also asked to have the Defendants compelled to respond to earlier discovery requests, which was also denied. The case came on for trial, by jury, on May 9, 1989. After the Petitioner rested her case, the District Court granted the motion of the Defendants, dismissing all of her claims, on the grounds that she had not proven a prima facie case of discrimination, during the limitation period.

On appeal, the Court of Appeals confirmed the decision and also denied a petition for rehearing, by order entered June 27, 1990.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Fourth Circuit, in applying the requirements for a prima facie case of discrimination in pay, under Title VII of the Civil Rights Act of 1964 and Sec 1983 of Title 42, required complete identity of title and position, rather than substantial similarity of position and situation, and is in conflict with the decisions of the Fifth and Eighth Circuits, and of the Supreme Court, and raises an important question of federal law.

It is respectfully submitted that the Court of Appeals for the Fourth Circuit erred in applying the requirements for a prima facie case of discrimination in pay. The Court of Appeals and District Court ruled that the actionable period under Title VII was the Petitioner's last two academic years, 78-79 and 79-80, and under Sec 1983, the second semester of the year 79-80.

An important part of the Petitioner's

proof was the comparison of her salary with that of black faculty members. The Petitioner sought to compare her salary with that of Evelyn Roberts, a black, for the year 71-79 and with Dandeson Panda, in the year 79-80.

Both the Petitioner and Evelyn Roberts were members of the Economics & Business Department. Both Roberts and the Petitioner had master's degrees when hired and during all times in issue. Mrs. Khan was hired one year before Roberts, in September 1971 and Roberts was hired in September 1972.

The following table compares the salary histories of the Petitioner and Roberts:

	Khan	Roberts
72-73	$8,334.00	$10,800.00
73-74	8,667.00	11,232.00
74-75	9,600.00	12,200.00
75-76	9,703.00	12,332.00
76-77	10,431.00	13,125.00
77-78	12,474.00	14,300.00

78-79 13,222.00 15,300.00

The Court of Appeals rejected the Petitioner's comparison with Roberts (Opinion, p.10) for the 78-79 year, because the Petitioner's title had been changed to lecturer, whereas Roberts' remained instructor (App 18). While the Petitioner's title changed, in no other way did her work, duties, or responsibilities change.

When the Petitioner was denied promotion in April 1978, the Administration ruled she could not remain employed under the tenure regulations, unless her position or title was changed to lecturer, a non-tenure track position. The change to lecturer had been used, in the past, to give a faculty member time to comply with the conditions needed for tenure or advancement. The University never characterized the change as a demotion. Jenkins stated:

> I need to point out that...we have had other occasions where a faculty member at this institution did not receive a promotion recommendation from the Chairman, was entering the seventh year of employment here, and would have been, by the Code, by the tenure policies, and by the tenure policy and regulations of this university, been subjected to the automatic procedures of those codes. That we attempted to do...
>
> * * *
>
> But the whole idea was to give Mrs. Khan a contract in her eighth year, which did not imply termination, in any way. So, it was done, in essence, to help Mrs. Khan, as opposed to trying to discriminate against her. As far as the salary is concerned, we made some errors, because we had upgraded her position last year, after the contract period ... (Pl Ex 151, p21)

He indicated the Petitioner was still eligible for promotion to Assistant Professor, in the position of lecturer:

> ...I cannot, and am not prepared at this moment to say, but if Dr. Carson came back to me and said he recommended Mrs. Khan for promotion, I would accept his recommendation and pass it on

(Pl Ex 151, p26).

In the year 79-80, the University hired a young black male, Dandeson Panda, as an instructor in the Business & Economics Department. Both he and the Petitioner had MBA degrees. His salary for his first year, 79-80, was $14,500.00. The Petitioner's salary was $13,883.00.

The Court of Appeals rejected the comparison, because the Petitioner's title was lecturer, while Panda's was instructor.

The decision of the Court of Appeals is in conflict with the decision of the Court of Appeals for the Fifth Circuit, in Uviedo v. Steves Sash & Door Co., 738 F.2d 1425 (1984), and Pittman v. Hattiesburg Mun. Separate Sch. Dist., 644 F.2d 1071 (1981) and with Katz v. School Dist. of Clayton, Missouri, 557 F.2d 153 (1977), decided by the Eighth Circuit, in that it required formal exactitude, including exact

similarity of job title, before allowing comparison of the Petitioner's pay with that of individuals of the favored race. Whereas, the Court, in the foregoing cases, required only substantial similarity for comparison and compared the actual positions involved.

In Uviedo v. Steves Sash & Door Co., supra, involving a Title VII claim, the Court said:

> To establish a prima facie case of discrimination respecting compensation, a plaintiff must prove (1) that she is a member of a protected class, and (2) that she is paid less than a nonmember for work requiring substantially the same responsibility. The Analysis is the same even where the two employees whose salaries are being compared are employed at different times in the same position. ... The issue in this case is whether Ana Uviedo and Elaine Fisher were in fact performing substantially the same job. Appellant contends that they were not. Supra 1431.

The Court held that a comparison of Uviedo's salary with that of one other

"Anglo" employee, whose position was substantially similar to the Petitioner's, was sufficient to prove her case of nationality discrimination in pay. Supra 1431.

In Pittman v. Hattiesburg Mun. Separate Sch. Dist., 644 F.2d 1071 5th Cir. (1981) the Plaintiff, a black, alleged racial discrimination in pay, in violation of Title VII. The Court held that evidence, comparing his salary with that of a white male, was sufficient to establish a prima facie case. (The difference was $1,200. per year.) The Court said:

> To establish a prima facie case of racial discrimination with respect to compensation, the Plaintiff must show that he was paid less than a member of a different race was paid for work requiring substantially the same responsibility. See Calcote v. Texas Educational Foundation, 578 F.2d 95; Quarles v. Phillip Morris, Inc., 279 F.Supp. 505. See also Corning Glass Works v. Brennan, 417 U.S. 188, 195, (1974)

(Equal Pay Act) and Ammons v. Zia Co., 448 F.2d 117, 119-20 (10th Cir. 1971) (elements of unequal pay claim same under Title VII and Equal Pay Act). The usual unequal pay case involves two employees, one black and one white, employed at the same time and doing substantially the same work. In this case, the two employees were employed at different times in the same position. The analysis is nontheless the same for this type of case. Supra 1074.

* * *

This Court concludes that, since it is shown that Pittman received unequal pay for substantially identical work, the prima facie case of racial discrimination in compensation was made out. Supra 1075.

In Katz v. School Dist. of Clayton, Missouri, 557 F.2d 153 8th Cir. (1977), an Equal Pay Act case involving the same issue, the Court said:

...We interpret the statute to mean that two employees are performing equal work, when it is necessary to expend the same degree of skill, effort and responsibility, in order to perform the substantially equal duties which they do, in fact,

> routinely perform with the knowledge and acquiescence of the employer. The Act cannot be avoided because the job titles of the employees are not the same, nor is the Act avoided if the official job descriptions of employees specify different duties. "Actual job requirements and performance are controlling." Supra 156.

Additionally, the Petitioner submits the decision of the Court of Appeals is in conflict with the principles expressed by the Supreme Court in Bazemore v. Friday, 478 US 385 92 L Ed 2d 315.

In the Petitioner's case, as in Bazemore v. Friday, 732 F.2d 662 (1984), the Court of Appeals rejected proof of discrimination, made by comparing the salary of individual minority employees of with that of substantially similar white employees. Supra 670, 671.

However, on review, in Bazemore, the Supreme Court indicated the Court of Appeals had erred in not giving probative

effect to comparisons of salaries between blacks and whites "who had comparable or lower positions and tenure" 479 U.S. 395 at 403. thus indicating the positions need not be identical in order to compare salaries between them as evidence of discrimination. Further illustrating the same point, the Supreme Court found probative evidence "consisting of individual comparisons between salaries of blacks and whites, similarly situated." Supra 403. LEd 332. The evidence involved was Ex GX102 & DX48.

In Texas Dept. of Burdine, 450 US 253, 101 S Ct 1089 (1981), the Court said, "McDonald Douglas teaches that it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally." Supra 259.

As the Petitioner's position remained substantially the same, after the change to lecturer in September 1978, as it had been,

it was proper to compare her salary, in 1979 with Roberts, then an instructor, and in 1979, with Panda, an instructor.

Consequently, the Petitioner urges that the Court of Appeals erred in ruling the Petitioner had not established a prima facie case, and applied standards of proof at variance with those applied in other circuits, and by the Supreme Court. The continued application of an improper standard of proof was highly prejudicial to the Petitioner, and will be injurious to others aggrieved by discrimination, and she urges that her case be reviewed.

II. The Court erred in denying the Plaintiff Essential Discovery.

In her original discovery request, made pro se, in March 1983., entitled "First Request for Production of Documents", the Petitioner asked for information, in Parts 2b&d, showing the race of the faculty and their salary, their full and part-time positions, their rank, qualifications, training and experience, faculty performance evaluations, and, for Asian faculty, all records showing those terminated, non-renewed or demoted. This information was essential for the Petitioner to prove her case. The Defendants only partially complied with the Petitioner's request and avoided giving the Petitioner any information showing the race and seniority of faculty members and accurately stating their salary. All the Petitioner's discovery efforts were made with-

out representation, until after the remand from the Fourth Circuit, in the Spring of 1988.

To show salaries, the Defendants produced Budget Documents, called BD-119s. These purport to show the salary a faculty member earned the preceding year. Not all faculty members were listed and many faculty members are paid from several position numbers, in different departments; and it is difficult to determine their real total salary. Frequently, administrators are paid out of teaching positions, and faculty, teaching in one department, are paid out of positions listed in another department. Often, names and salaries are handwritten, in an illegible manner. Other times, it is impossible to determine which individual is receiving what, from the handwritten entries. Mid-term raises, and their effective dates, are not included.

This method lacked the accuracy that payroll information would have given. The Defendants never produced the payroll information. The BD-119s furnished no information on race, length of service, or degree and education of the faculty.

The Defendants' objection to furnishing most of the information is difficult to understand, since under Sec 126-23 of the North Carolina Code, it is required to be kept and made available to the public (App 42).

In May 1988, after the case was remanded from the Court of Appeals, the Petitioner, by counsel, moved to conduct further discovery, saying it was necessary to prepare a statistical analysis and, because the Defendants had not fully responded to prior requests (App 44). The Magistrate ruled, denying the request, "without prejudice to the Plaintiff's sub-

mitting to th Court for approval, a proposed discovery schedule, setting forth with specificity, the discovery desired, including the number of interrogatories, and request for production and certification of counsel that is not duplicative of any prior discovery requests" (App 46). The Petitioner attempted to comply and submitted a proposed schedule (App 48). Because some of the information had been requested before, but had not been furnished - such as race - Counsel could not state that the request would not be duplicative, but stated:

> The certificate of counsel, accompanying the interrogatories and production request, would specify how any matter, not new, was not fully answered or produced in the past (App 48).

The Magistrate denied the request because the certificate did not catagorically rule out all duplication (App 51). In her motion, the Petitioner had explained

why the additional discovery was needed (App 44). The District Court affirmed the order on appeal, for the same reason as the Magistrate (App 53). The effect of the Court's application of the Magistrate's requirement was to make it impossible to get the information needed by the Petitioner to prove her case, and effectively denied all further discovery to her, as was its intent.

In desperation, closer to trial, the Petitioner filed a motion to compel the Defendants to produce the documents, earlier requested by her, when she was unrepresented, which was also denied (Rec 110). The information the Petitioner had requested initially, and after remand, was of the type that has been recognized as essential and proper in cases of racial discrimination, and the Petitioner submits it was extremely prejudicial to her case,

to deny this information to her.

In Burns v. Thiokol Chemical Corporation, 483 F.2d 300 (1973), the Petitioner sought discovery in a racial discrimination in employment case. The Court reversed ruling that the Plaintiff had been denied a fair trial of his VII claim, because of the denial of discovery and remanded the case for a new trial. It said:

> Because discovery matters are committed almost exclusively to the sound discretion of the trial Judge, appellate rulings delineating the bounds of discovery, under the Rules, are rare. But the Judge's discovery rulings, like his other procedural determinations, are not entirely sacrosanct. If he fails to adhere to the liberal spirit of the Rules, we must reverse. And this is especially true in Title VII cases, where courts have refused to allow procedural technicalities to impede the full vindication of guaranteed rights. Supra 304-305.
>
> * * *
>
> The importance of obtaining an overall statistical picture of an employer's practices, with regard

> to both Black and White employees, does not depend on the presence of an alleged "pattern or practice" or a valid charge of class discrimination or class action. We categorically rejected this notion in Georgia Power v. EEOC, supra.
>
> * * *
>
> Even though a suit seeks only individual relief for an individual instance of discrimination, and is not a "pattern or practice" suit by the government or a class action, the past history of both Black and White employees is surely relevant information...It is therefore discoverable. Supra 306.
>
> * * *
>
> The point is that open disclosure of all potentially relevant information is the keynote of the Federal Discovery Rules. In this case, that focal point has been ignored. Supra 307.

In Weahkee v. Norton, 621 F.2d 1080, 10th Cir. (1980), the Court of Appeals reversed a case, which had been tried, because the Plaintiff had not been allowed sufficient discovery, to do a statistical analysis of the Defendants' employment

practices.

In Diaz v. American Telephone & Telegraph, 752 F.2d 1356 9th Cir. (1985), the Court reversed and remanded the case because the district court had not allowed the Plaintiff sufficient discovery and stated:

> Statistical evidence is unquestionably relevant in a Title VII disparate treatment case. Statistical information is helpful in establishing a prima facie case "despite the fact that [it] may not be directly probative of any of the four specific elements, set forth by McDonnell Douglas." Supra 1362.
>
> * * *
>
> Even when not sufficient to establish a prima facie case, statistical evidence is helpful in showing that an employer's articulated reason for the employment decision is pretextual. In some cases it may be essential:
>
> Statistics showing racial or ethnic imbalance are probative.. .because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory

> hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired...."In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved." International Brotherhood of Teamsters v. United States, 431 U.S. 324. Supra 1363.

In Trevino v. Celanese Corp., 701 F.2d 397 5th Cir. (1983), a nationality and racial discrimination case, the Court said:

> The imposition of unnecessary limitations on discovery is especially frowned upon in Title VII cases..."It is plain that the scope of discovery through interrogatories and requests for production of documents is limited only by relevance and burdensomeness, and in any EEOC case the discovery scope is extensive." Supra 405-406.

* * *

> It is clear that the scope of allowable discovery in the instant case should have been considerably broader than it was. Trevino was effectively hamstrung by the district court's order

limiting discovery. Supra 406. The Court ruled the Plaintiff had been prevented from obtaining relevant discovery and reversed.

All the above cases were reversed, because the Plaintiff had been prevented, by the denial of discovery, from having a full opportunity of proving his case.

Having been denied discovery, the Petitioner attempted to prepare a statistical study, using available public information. This consisted of the BD-119s and college catalogs, which listed the faculty. The Petitioner relied on personal knowledge and recollection of several friends to obtain races of the faculty, which was not a reliable or complete source. The results were received in evidence at trial, and showed that Asians, during all years, received lower salaries than blacks. In the years 78-79 and 79-80, the difference

was not statistically significant, which the trial Judge held disproved the Petitioner's case (App 36).

The Petitioner believes if she had been given accurate information, in faculty salaries, race and tenure, a statistical analysis would have produced statistically significant results for the last two years of her employment, as well.

The denial of discovery concerning work assignments, faculty qualifications, and education prevented her from making a more detailed comparison between her job situation and that of comparable blacks, and caused the Petitioner's whole claim of discrimination in work assignments to fail for lack of evidence (Opinion, n3, App 13).

As a further example of the prejudice the Petitioner suffered, she was not able to rebutt or test the explanation of the

Defendant for pretext. The Court of Appeals attached weight to the fact that Roberts had thirty hours of additional study at UNC. The Petitioner was never furnished any documentation, evidencing that fact before trial, although it fell within the Petitioner's requests and proposal for discovery. Consequently, it could not be properly tested, by cross-examination or introduction of rebuttal evidence. The Defendants produced no supporting documentation at trial.

The Petitioner never received any information from the Defendants, giving the race of faculty or their length of employment, nor was this information available, in any other source, to her. Both were essential to a statistical study of discrimination in pay. The information the Defendants furnished, concerning salary and rank was unclear and unreliable.

The Petitioner submits that the denial

of her motion, made a year before trial, requesting leave for discovery for a statistical study and to obtain information requested but not furnished earlier, was an abuse of discretion, and its affirmation by the Court of Appeals is contrary to decisions of the Fifth and Ninth Circuits, and principles expressed in the recent case of University of Pennsylvania v. EEOC, 493 US 107 L Ed 2d 571, and is such an injustice and departure from normal procedure, as to call for the exercise of the supervisionary responsibility of the Supreme Court.

III. The Petitioner's statisctical study, comparing the pay of blacks with non-blacks was admissible and probative evidence.

The Petitioner offered in evidence, a statistical regression study, which, in Table Five, compared the salary of blacks with non-blacks, for each of the years 72-73 through 79-80. In all but one year (78-79), the results were highly significant of discrimination in pay, ranging from 2.29 to 3.9 standard deviations (App 61, Pl Ex 241, p15). This evidence was excluded, in the 1993 case, by the District Court (Tr 154-166), and ruled non-probative by the Court of Appeals because it considered it not relevant, and because a comparison of the salary of Asians with blacks, for 78-79 and 79-80 was not statistically significant (1.43 and 1.52) (Opinion, p11, Note 6, App 21). The Petitioner asserts this was an error, prejudicial to her case.

See 2000e-2 of Title VII makes it unlawful for an employer "to discriminate against any individual...because of such individual's race" or, "to limit, segregate, or classify an employee" because of such employee's race or national origin.

The Petitioner alleged and argued that the Respondent followed a policy of favoring blacks over non-blacks, in employment matters.

In Count I of her Amended Complaint, the Petitioner alleged the Respondents "continue to operate ...in a racially segregated manner, insofar as hiring, promotion and granting of tenure...Non-Negro personnel and professional staff members are subjected to more stringent hiring, promotion, and tenure patterns, than are Negro personnel, and Negro personnel are granted preferred treatment, in terms of assignments and pay."

The Petitioner argued to the District

Court, that the Plaintiff's theory was that the Respondents were discriminating in favor of blacks, and that this resulted in discrimination against all non-blacks (Tr 223).

A realistic view of human experience shows that a dominant racial group frequently discriminates in favor of individuals of its own kind. Historically, whites have discriminated in favor of other whites, over non-whites. It was chiefly to correct this practice, that the Civil Rights Act of 1964 was passed.

The intent to prefer blacks is like a similar intent to prefer whites, and is discriminatory against those who are non-black. The intent of the Defendants to prefer blacks, constitutes a classification of the Defendants employees, by race, into black and non-black groups.

In numerous past cases, the courts

have recognized and applied the Civil Rights law to discrimination by whites against non-whites, that is against a mixed group of persons, who differed from the dominant or majority group.

The joining of two minority groups in one suit, as joint victims of majority racial discrimination in employment, has been upheld. In Teamsters v. the United States, 431 US 324, 52 L Ed 2d 396, (1977), a suit brought on behalf of negro and Spanish-surnamed employees, it was alleged the employer discriminated, in hiring, against minority line drivers, who were treated as a class. Supra 329, 333. There, the statistics concerned the number of minority employees, who were promoted to line drivers, and were held probative of discrimination. "The Government's" theory of discrimination was simply that the company... regularly and purposefully treated Negroes

and Spanish-surnamed Americans, less favorably than white persons." Supra 335.

In Woodbury v. New York City Transit Authority, 832 F.2d 764 (2nd Cir. 1987), the court of appeals did not disprove of a statistical comparison of white and minority police officers. The minority group was made up of both blacks and Hispanics. However, the result was not statistically significant.

In Wards Cove Packing Co. v. Atonio, 490 US ___, 104 L Ed 2d 733, a statistical study, comparing white employees with a racially mixed group of minority employees, was impliedly approved, as well.

The principle involved was expressed by the Supreme Court, in McDonald v. Santa Fe Trail Transport Co., 427 US 273, 49 L Ed 2d 453:

> Title VII of the Civil Rights Act of 1964, prohibits the discharge of "any individual,"

> because of such individual's race ...Its terms are not limited to discrimination against any particular race.
>
> Thus, although we were not there confronted with racial discrimination against whites, we described the Act in Griggs v. Duke Power Co., 401 US 424, as prohibiting discriminatory preference for any racial group minority or majority. Supra 279.

The Petitioner's theory, like that of the Plaintiff's in Teamsters and Woodbury, was that the majority group discriminated, in favor of itself, against non-majority members.

The Petitioner's statistical expert, Alvin Best, testified he did a statistical test for every year, to see if Asians and whites were treated similarly. He found that they were, and said there was "statistical justification" for the black versus non-black comparison (Tr 134-135).

The statistical study, based on this comparison (Table 5 of Pl Ex 241), was

highly significant. It was prejudicial for the District Court to exclude it from evidence and for the Court of Appeals not to consider it as evidence of racial discrimination by the Defendants.

IV.

The Court of Appeals and District Court did not properly consider all the evidence.

The Petitioner contends, if all the evidence is properly considered together, she did meet her burden of proof.

May 1978, in the 77-78 academic year, was two years prior to the Petitioner's EEOC charge, by letter, on May 8 (Pl Ex 4). Consequently, the paycheck she received, for that month, was actionable, under Title VII. See Crawford v. Western Elec. Co., 614 F.2d 1300 (1980); Thompson v. Sawyer, 678 F.2d 257 (1982); and Furr v. A.T.&T., 824 F.2D 1537 (10th Cir. 1987). There were 3.9 standard deviations between the salary of Asians and blacks, in 77-78. Additionally, in that year, she and Roberts had the same rank and title; yet her salary was $12,474, and Roberts was $14,300. (Tr 59). These facts, plus the other evidence,

clearly proves an actionable case under Title VII, against the University and Jenkins, for discrimination in pay in May 1979.

Neither the Court of Appeals or the District Court considered the strong statistical history of discrimination in pay against Asians and whites, during the five years 73-77 (Pl Ex 241). The standard deviation between Asian and black salary, during the period was: 73-74-2.16; 74-75-2.64; 75-76-2.19; 76-77-3.9; 77-78-3.12 (Pl Ex 241, Table 4). This was strong evidence against the University and, also, against Jenkins, as he began fixing salaries in July 1977.

The statistical evidence showed for all years involved, 1972 - 79-80, that the Petitioner would have received a greater salary, if she had been black. The difference for each year was: 72-$1,605.; 73-

$1,752.; 74-$1,711.; 75-$1,290.; 76-$1,550.; 77-$972.; 78-$521.; 79-$486.

The Court of Appeals attached no weight to Khan's testimony that Carson told her the University Administration had a policy of getting rid of the Asians in the Department (Tr 48), or Nazami's testimony that Carson explained to him that the University had a policy of holding positions open, until the "right people" were available, meaning blacks, and that he was being removed to make room for Penny, a black (Tr 19-21). The Court of Appeals treated these as mere statements of Carson's opinion and therefore, not entitled to weight (App 20). However, Carson was Department Chairman, at the time, and was involved in all terminations from his department, and was a part of the University's administration. Consequently, they were statements about a subject, with which he would be acknowledge-

able, and were made in the scope of his employment, and should have been treated as evidence against the Defendants. Four of the five Asians in the Business Department were involuntarily terminated (Tr 49).

The Court of Appeals did not comment upon or consider the fact that, in September 1977, Jenkins hired a black, Bobby Lewis, for a vacancy in the Biology Department, when the zoology professor died. The Department Committee had recommended an Asian, Dr. Malik, with much experience teaching zoology. Instead, Jenkins hired a young black, who could not teach zoology, at a higher salary - $17,500. - than the highest which had been listed - $16,000. - as available in the Position Announcement (Tr 91-95).

Jenkins removed the Petitioner's husband, as Biology Chairman, after he complained about this and other discrimina-

tions in pay (Tr 96, 174).

The University justified her promotion denial because her doctorate studies had been done at a non-accredited, or non-traditional college. However, her doctorate program was approved by the University, which had given her grants for her studies, totaling $2,710. Evelyn Roberts, a black in the Business Department, also applied for admission to the doctorate program, at the same university, California Western, in January 1977 (Pl Ex 86), with approval of the Administration. However, her promotion to Assistant Professor, in August 1979, was based on a claimed thirty hours of non-doctorate study, at another university. During discovery, the Petitioner was never given any records, supporting this claim. Carson admitted that Roberts had never done anything toward getting a doctorate, before or after her promotion (Tr 200-201).

As stated above, the University's justification for denying promotion and tenure, to the Petitioner, was that she had attended a non-accredited institution. However, in January 1978, the University promoted Venus Deonanan, a black, who had attended a non-accredited university (Pl Ex 71, App 57). Jenkins was aware of this, at the time the Petitioner was denied promotion (Tr 161).

The Petitioner urges that the Court of Appeals failed to make its ruling on all the evidence in the record, as required in Bazemore v. Friday, 478 US 385, 92 L Ed 2d 315 (1986), 478 US at 404. When all the evidence is considered, it is clear that she carried her burden of proof.

CONCLUSION

Here the Petitioner's evidence clearly showed an actionable violation of Title VII, for her salary in May 1978, against

the University and Jenkins which alone, she urges, requires reversal of the Court of Appeals decision in her case.

If she is given the benefit of the comparison of the black versus non-black salaries, there is clear statistical evidence of discrimination for the years 79-80, as well. The statements of Carson, showing an intent to remove Asians, the long period of very clear discrimination in pay against Asians, from 1973 to 1977, plus the comparison of the Petitioner's salary with that of comparable blacks, in her last two years, and the other circumstantial evidence of bias in favor of blacks, she submits, show, when considered as a whole, she carried her burden of proof.

Whatever inadequacies there are in her case, are due to the preemptory and arbitrary decision to deny her discovery, made in May 1988, more than a year before trial.

This action prevented her from having a fair trial on the merits of her claim and the full benefit of representation by counsel.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MUMTAZ BANO KHAN

Mumtaz Bano Khan

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1750

MUMTAZ BANO KHAN

Plaintiff - Appellant

v.

JIMMY R. JENKINS, JOHN H. CARSON;
ELIZABETH CITY STATE UNIVERSITY

Defendants - Appellees

and

MARION D. THORPE

Defendant

On Petition for Rehearing with Suggestion for Rehearing In Banc.

O R D E R

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court, or the panel, requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Chief Judge Ervin, with the concurrence of Judge Hall and Judge Chapman.

For the Court,

JOHN M. GREACEN
CLERK

Filed June 27, 1990.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1750

MUMTAZ BANO KHAN,

Plaintiff - Appellant,

versus

JIMMY R. JENKINS, JOHN H. CARSON,
ELIZABETH CITY STATE UNIVERSITY,

Defendants - Appellees,

and

MARION D. THORPE, Defendant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Elizabeth City. W. Earl Britt,
Chief District Judge. (CA-82-39-2-CIV)

Argued: April 6, 1990

Decided: June 5, 1990

Before ERVIN, Chief Judge, and HALL and CHAPMAN, Circuit Judges.

Affirmed by unpublished opinion. Chief Judge Ervin wrote the opinion, in which Judge Hall and Judge Chapman joined.

ARGUED: Oldric J. LaBell, Jr., Newport News, Virginia, for Appellant. Thomas J. Ziko, Assistant Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees. ON BRIEF: Lacy H. Thornburg, Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees. General on brief) for Appellees.

ERVIN, Chief Judge:

In this action, Mumtaz Bano Khan, an Asian American, alleged that the defendants violated Title VII of the Civil Rights Act of 1964 (42 U.S.C. SecSec 2000e), 42 U.S.C. Sec 1983, and 42 U.S.C. Sec 1981, by discriminating against her on the basis of gender and race, in assigning salary levels and work assignments. At the close of Khan's evidence, the district court granted the defendants' motions for directed verdict on Kahn's Sec 1981 and Sec 1983 claims, and dismissed her remaining Title VII claim. For the reasons explained below, we affirm the decisions of the district court.

I.

Khan is a United States citizen of Pakistani origin. In August 1971, she was hired by the defendant, Elizabeth City State University ("ECSU" or "the Univer-

sity"), as an instructor in its Business and Economics Department. Defendant John H. Carson is chairman of the Business and Economics Department, and defendant Jimmy R. Jenkins is the University Vice Chancellor for Academic Affairs. ECSU is part of the University of North Carolina system and is a state institution. Historically, it was an all-black college and has maintained a black majority in its administrative positions, faculty, and student body.

ECSU had employed Khan as an instructor, under a series of one-year contracts, for a period of seven years, beginning in 1971. The last of these one-year contracts covered the 1977-78 academic year. According to the University's tenure policies, appointments to the rank of instructor, an untenured position, are limited to seven years. A faculty member who has been an instructor for seven years must either be

promoted, demoted to a "special faculty" (lecturer) position, or released from employment. To be promoted to the position of assistant professor, an instructor must complete thirty semester hours of study above a master's degree.

Khan had enrolled in a correspondence Ph.D. program, from California Western University ("CWU"), an unaccredited institution. CWU gave Khan credit for her "life experiences"; therefore, even though she completed the course requirements for the degree, she never completed thirty hours of actual course work.[1] Consequently, ECSU offered Khan an appointment as a lecturer for the 1978-79 academic year, which she accepted.

After Khan's first year as a lecturer,

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[1] Furthermore, Khan failed to provide ECSU with an official transcript of her studies at CWU, until after her termination.

ECSU decided to terminate her employment, at the end of the following year. ECSU notified Khan of its intent by a letter, dated July 31, 1979, attached to a one-year contract, specifying that her appointment for the 1979-80 academic year was terminal. Khan protested the decision, but did subsequently sign the contract, on August 14, 1979.

After being demoted to "lecturer" status, Khan filed a charge with the Equal Employment Opportunity Commission ("EEOC") on November 7, 1978, alleging that ECSU had denied her promotion, tenure, and equal pay because of her race and gender.[2] The EEOC did not take any immediate action on this first charge. In 1980, shortly before her termination, Khan filed a second charge with the EEOC, again claiming that the

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[2] Thereis no evidence in the record of any discrimination, on the basis of gender.

University had, because of her race and gender, demoted her, denied her tenure, terminated her employment, and failed to pay her a salary equal to that paid to similarly situated faculty members. The EEOC issued Khan a right to sue letter, on her first EEOC charge, on August 28, 1981, but she failed to file any action, based on tht letter. On September 30, 1982, the EEOC issued Khan a second right to sue letter on her second charge.

On January 14, 1983, Khan served the University with a pro se complaint, alleging that it had discriminated against her, under Title VII when it denied her tenure, failed to promote her, terminated her employment, and paid her an unequal salary. That complaint was amended, with the assistance of counsel, on January 25, 1984, to include claims for relief under 42 U.S.C. Sec 1981, 42 U.S.C. Sec 1983, 29

U.S.C. Sec 621 (the Age Discrimination in Employment Act ("ADEA")), and 29 U.S.C. Sec 206 (the Equal Pay Act).

The district court granted summary judgment for the University on all of Khan's claims, except those asserted under the Equal Pay Act, on the grounds that Khan had either failed to file a charge, alleging a violation of her rights, with the EEOC within 180 days of the discriminatory acts alleged, or had failed to file the complaint within the appropriate statute of limitations. The parties settled Khan's claim, under the Equal Pay Act.

Khan appealed this summary judgment, and this court affirmed the district court's dismissal of Khan's ADEA claim and her civil rights claims, relating to the denial of tenure, the denial of promotion, and discriminatory termination. This court, however, relying on the principle

that denial of equal pay and work assignments is a "continuing violation," reversed and remanded the district court's order, dismissing the claims under Sec 1981, Sec 1983, and Title VII. Khan v. Jenkins, No. 85- 2252 (4th Cir. Mar. 19, 1987).

These remaining claims were tried on May 9, 1989, in the United States District Court for the Eastern District of North Carolina. A jury was present at trial, to hear the evidence relevant to the Sec 1981 and Sec 1983 claims, and the district court judge was the factfinder for the Title VII claims. At the conclusion of Khan's evidence, the district court, pursuant to Fed. R. Civ. P. 41(b), dismissed Khan's Title VII claims, and, pursuant to Fed. R. Civ. P. 50(a), directed a verdict for the defendants, on all her other claims.

Khan appeals from these decisions.

II.

An appeal from a motion for a directed verdict is reviewed de novo. Gairola v. Commonwealth of Va. Dept. of General Services, 753 F.2d 1281, 1285 (4th Cir. 1985). In other words, "in determining whether the verdict in this case should have been directed, we must apply the same standard [that was or should have been] employed by the district court, in passing on the original motion." Tights, Inc. v. ACME-McCrary Corp., 541 F.2d 1047, 1055 (4th Cir.), cert. denied, 429 U.S. 980, S. Ct. 493, 50 L. Ed. 2d 589 (1976). The test for a directed verdict, at either the trial or the appellate level, is "whether there was sufficient evidence to support a verdict for the party opposing the motion." Id.; see also, Lust v. Clark Equipment Co. Inc., 792 F.2d 436, 437-38 (4th Cir. 1986); cf. Gairola, 753 F.2d at 1285 ("whether there

can be but one conclusion, as to the verdict that reasonable jurors could have reached").

Factual findings by the court in Title VII cases can only be reversed on appeal, if they are clearly erroneous. See Mallory v. Booth Refrigeration Supply Co., Inc., 882 F.2d 908, 909 (4th Cir. 1989).

III.

Khan brought her Title VII claim under a "disparate treatment" theory that Asian Americans were paid less and given more difficult work assignments, at ECSU, than Black Americans.[3]

In Title VII disparate treatment cases,[4] the plaintiff has the initial bur-

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[3] In her discriminatory work assignment claim, Khan failed to show any disparate treatment. She was required to teach fifteen semester hours in the fall of 1978-79, three more than the normal teaching load. It was not unusual, however, at ECSU, for faculty members, regardless of race, to teach fifteen hours in a semester.

[4] The disparate treatment of employees is prohibited by Sec 703(a)(1) of Title

den of establishing by a preponderance of the evidence, a prima facie case of discrimination. See, e.g., Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253-54, 101 S. Ct. 1089, 67 L. Ed. 2d 207, 215-17 (1981). To establish a prima facie case, the plaintiff must raise an inference that the defendant acted with disciminatory intent, i.e., plaintiff's adverse employment action occurred "'under conditions which, more likely than not, were based upon impermissible racial considerations.'" Gairola, supra, at 1286 (quoting Young v.

VII, which states:

> It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. Sec 20003-2(a)(1).

Lehman, 748 F.2d 194, 196 (4th Cir. 1984), cert. denied, 471 U.S. 1061, 195 S. Ct. 2126, 85 L. Ed. 2d 489 (1985)). In addition to direct and circumstantial evidence of discriminatory treatment, plaintiffs can meet their burden using the Supreme Court's model, set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 37 L. Ed. 2d 668, 667 (1973). The McDonnell Douglas analysis, as applied to unequal pay claims, requires a plaintiff to show: (1) that she is a member of a protected class; (2) that she is as qualified as employees not of the protected class; and (3) that she was paid less than these other comparably qualified employees. See Bazemore v. Friday, 751 F.2d 662, 670 (4th Cir. 1984), aff'd in part, rev'd in part on other grounds, 478 U.S. 385, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986) (per curiam).

In most employment discrimination cases, the most difficult element of a prima facie case, for a plaintiff to show, is causation or motivation -- did the defendant take the action in question because of the plaintiff's race, sex, national origin or age? A plaintiff can meet her original production burden, on this issue, by the McDonnell Douglas presumption framework described above, by direct evidence (which is rarely available), or by indirect circumstantial evidence with sufficient cumulative probative force to support an inference of discrimination. See Loeb v. Textron, 600 F.2d 1003, 1017 & n.18 (1st Cir. 1979) (discussing alternative methods of establishing a prima facie case).

Perhaps the most thorough discussion, in this circuit, of the sufficiency of evidence of discriminatory motivation to

establish a prima facie case, can be found in Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982) (affirming the district court's grant of judgment notwithstanding the verdict for defendants in an ADEA case). In Lovelace, this court emphasized the need for evidence showing a "reasonable probability," not just a mere possibility, of discriminatory motivation. Id. at 241-42 (discussing prior Fourth Circuit precedents).

> This emphasis, where causation is dispositive upon "probability," "reasonable probability," and "substantial probability," rather than mere "possibility" as the proper test, simply bespeaks the special danger that in a matter so generally incapable of certain proof, the jury decision will be on the basis of sheer speculation, ultimately tipped, in view of the impossibility of choosing rationally between mere "possibilities," by impermissible, but understandable, resort to such factors as sympathy and the like. It is, of course, precisely to guard against this danger, that the burden of producing rationally

> probative evidence -- and the corresponding risk of nonproduction -- is placed upon claimants and subjected to the ultimate jury control devices of directed verdict and judgment n. o. v.

Id. at 242 (citations omitted). The determinative question before this court is whether the cumulative effect of this evidence is sufficient to show a "substantial probability" of discrimination, in setting salary levels at the University.

In the present case, there is no direct evidence of discriminatory intent to pay Asian instructors less than Black faculty. Khan also fails to invoke the presumption of discrimination, under McDonnell Douglas, because she is unable to point to other similarly situated instructors, who were paid more than she was. Khan attempted to compare her salary with that of two Black faculty members at ECSU. Evelyn Roberts, a Black instructor in the Business and Economics Department, was

hired in 1972, one year after Khan. Although she received a higher salary than Khan and, in 1979, was promoted to Assistant Professor, Roberts completed thirty semester hours of study, beyond her master's degree, at UNC-Greensboro and, therefore, fulfilled the requirements for promotion. Dandeson Panda was hired as an instructor in 1979, at a salary $600 higher than Khan's. Khan, however, by that time, had been demoted to a position as lecturer and, therefore, was not at the same level as Panda.

In addition, her indirect evidence of instances of alleged discrimination, in other areas at ECSU, and statistical evidence, does not establish a reasonable probability of discrimination in salary levels. In 1977, there were five Asian faculty members in Khan's department, but only one remained, as of 1980. There is no

evidence, however, linking the departure of the other four faculty members with any deliberate discrimination, by the University or its officials.[5] Khan also introduced statistical evidence, that was considered, in support of her Title VII cause of action against the University. The evidence did not show significant differences in salaries paid Asians and Blacks, in the relevant years of 1978-79 and 1979-80. Even if there was a statistically significant difference between the salaries of Blacks and non-Blacks, during

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[5] Khan asserts that Carson told her that it was the policy of the administration "to get rid of all the Asians" and replace them with Blacks. Carson denied ever having made such a statement. Nevertheless, considering this testimony in the light most favorable to Khan, it is nothing more than Carson's opinion of the ECSU "administration." There is no evidence of any actual efforts to eliminate Asian faculty from the University, and this statement certainly is not sufficient to establish a substantial probability of discrimination, with regard to salary levels.

these years,[6] this difference does not establish a prima facie case that ECSU discriminated against Khan, who was Asian, when there is no legally significant difference in the salaries of Asians and Blacks.

Because Khan's evidence did not raise an inference that any of the defendants acted with discriminatory intent, the district court did not err in dismissing her employment discrimination claims, pursuant

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[6] The standard deviation in the salaries of Blacks and non-Blacks, in 1979-80, was 2.99. This court has held that "courts should be extremely cautious, in drawing conclusions [of legal significance] from standard deviations, in the range from one to three," but that deviation of more than three can safely be used to exclude chance as a hypothesis and confirm an inference of discrimination. E.E.O.C. v. American - National Bank, 652 F.2d 1176, 1192 (4th Cir. 1981), cert. denied, 459 U.S. 923, 103 S. Ct. 235, 74 L. Ed. 2d 186 (1982); E.E.O.C. v. Federal Reserve Bank of Richmond, 698 F.2d 633, 647-48 (4th Cir. 1983), rev'd in part on other grounds sub nom. Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 104 S. Ct. 2794, 81 L. Ed. 2d 718 (1984). Because a statistical comparison

acted with discriminatory intent, the disto Fed. R. Civ. P. 41(b). Moreover, Khan did not present evidence sufficient to support a verdict that Carson or Jenkins deprived her of equal "rights, privileges or immunities, secured by the Constitution and laws." 42 U.S.C. Sec 1983. Therefore, directed verdicts for the defendants were also proper on her section 1983 and section 1981 claims.[7]

IV.

Khan also claims that the district

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of the salaries of Blacks and non-Blacks is not as instructive in this case as a comparison of the salaries of Asians and Blacks, we need not decide whether this difference is legally sufficient to establish an inference of discrimination.

[7] In Patterson v. McLean Credit Union, 491 U.S. ___, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989), the Supreme Court held that 42 U.S.C. Sec 1981 applies only to two distinct rights: the right to make contracts and the right to enforce contracts. 491 U.S. at ___, 109 S. Ct. at 2373, 105 L. Ed. 2d at 150. Following the Patterson decision, section 1981 does not provide an independent cause of action against the

court erred in excluding the statistical evidence, which was summarized above, from her section 1981 and section 1983 claims against Carson and Jenkins. Dr. Carson was appointed chairman of the Business and Economics Department in 1977. Dr. Jenkins became ESCU Vice Chancellor for Academic Affairs in 1977. Before the 1978-79 academic year, neither man had any responsibility for salaries. The statistical evidence indicated no significant differences between the salaries of Asians and Blacks, after 1977. Therefore, the court excluded this evidence as nonprobative, with regard to Khan's claims against Carson and Jenkins.[8]

The decision to exclude expert

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defendants for salary discrimination.

[8]In addition, as explained in note 6, supra, the evidence showing disparities in the salaries of Blacks and non-Blacks was not relevant to Khan's claims.

statistical evidence lies within the sound discretion of the trial judge and should not be disturbed, unless such decision constitutes an abuse of discretion. See Herold v. Hajoca Corp., 864 F.2d 317, 321 (4th Cir. 1988), cert. denied, ___ U.S. ___, 109 S. Ct. 3159, 104 L. Ed. 2d 1022 (1989). We find that the district court's decision to exclude this evidence was not an abuse of discretion.

V.

AS her final argument on appeal, Khan asserts that the defendants refused to comply with discovery requests for information, indicating the race of the faculty and their salaries. The defendants did produce budget documents, called BD-119s, which showed the salary that faculty members earned the preceding year, but the University did not disclose information, regarding the race of the faculty.

After this court remanded this case in 1987, Khan requested leave to conduct further discovery and asserted that the University had not fully redponded to earlier discovery motions. The magistrate directed Khan to submit, for the court's approval, "a proposed discovery schedule setting forth, with specificity, the discovery desired, including the number of interrogatories, requests for production, and certification of counsel that it is not duplicative of any prior discovery request." Khan submitted a proposed discovery schedule on May 9, 1988, but did not certify that it would not be duplicative of earlier requests. The schedule did not attempt to explain why certification was not appropriate or why additional discovery was needed. In light of Khan's failure to comply with his earlier order, the magistrate denied the motion for additional discovery, and

the magistrate's decision was subsequently affirmed by the district court. Khan's later efforts to secure additional discovery were not timely and, as the magistrate found, clearly would have prejudiced the defendants' preparation of their defense.

It is well established that district courts have wide latitude in controlling the scope and course of discovery, and their decisions, regulating discovery, should not be overturned, absent clear proof of an abuse of discretion. See, e.g. Ardrey v. United Parcel Service, 798 F.2d 679, 682 (4th Cir. 1986), cert. denied, 480 U.S. 934, 107 S. Ct. 1575, 94 L. Ed. 2d 766 (1987). We find no clear proof that the district court abused its discretion in denying Khan's incomplete, and then untimely, requests for discovery.[9]

VI.

After considering all of the evidence

in their briefs, we hold that the district court properly granted directed verdicts on Khan's section 1981 and section 1983 claims and properly dismissed her Title VII claim. Further, we find no abuse of discretion in either the exclusion of some of the statistical evidence, or the district court's management of discovery, prior to trial. Therefore, the decisions of the district court are

AFFIRMED.

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[9]Even if the magistrate and trial court judge erred in not compelling further discovery, the additional information, requested by Khan, would not have had any effect on the results in this case. Using information, provided by the defendants, and material readily available to her, Khan was able to produce an extensive statistical analysis of salaries paid male, female, White, Black, and Asian faculty at ECSU. Khan's expert testified, regarding the results of this analysis, and the district court admitted his testimony as evidence in support of her Title VII claims, against the Univeristy. Khan apparently was able to obtain, from other sources, the information necessary for her statistical analysis; thus, as an alternative basis for our holding, we find any error in the court's

denial of Khan's motions to compel discovery, to be harmless. Cf. LaRouche v. National Broadcasting Co., Inc., 780 F.2d 1134, 1139 (4th Cir. 1986) (availability of information from alternative sources is a relevant factor in determining whether district court abused its discretion in denying motion to compel discovery).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
Elizabeth City Division

MUMTAZ BANO KHAN Plaintiff

v. Civil No. 82-39-CIV-2

JIMMY R. JENKINS, et al.

Defendants

O R D E R

This matter is before the court on remand from the United States Court of Appeals for the Fourth Circuit, on claims by Plaintiff, that she received unequal pay and unequal work assignments because of her sex and race. Trial was held on 9 May 1989 and 11 May 1989. At the close of Plaintiff's evidence, the court heard motions for directed verdict on Plaintiff's claims, pursuant to Title 42, United States Code, Sections 1981, 1983, and 2000e. After oral argument, consideration of the evidence presented, and a review of relevant case law, the court granted those motions.

With respect to the Title VII claim, 42 U.S.C. Sec 2000e, and pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the court now makes the following

FINDINGS OF FACT

1. Plaintiff is a female, naturalized United States citizen, who was born in India.

2. Plaintiff was employed as an instructor and as a lecturer in the Business Department of Elizabeth City State University (ECSU), from 1971 through 1980.

3. Plaintiff received a Bachelor of Science Degree in Business Education from ECSU, and a Master's Degree in Business Administration from East Texas State University.

4. In August 1976, Plaintiff was informed that, pursuant to University rules, she was required to make progress in and pursue her Ph.D., in order to continue

to qualify for her position and/or to be promoted to the position of assistant professor.

5. In late 1976, Plaintiff enrolled in a correspondence study program with California Western University (CWU), a non-accredited institution.

6. On 25 August 1977, Plaintiff informed her superiors, including Defendant Carson, that she had completed the course work required for her Ph.D. program at CWU.

7. On 31 October 1977, Plaintiff was advised by ECSU to continue working toward her Ph.D.

8. In April 1978, Plaintiff was demoted to a temporary position, as a lecturer, and was no longer on the tenure track.

10. Plaintiff continued employment with EDSU, until the end of the 79-80 academic year. Plaintiff's last day of

employment was 31 May 1980.

11. Plaintiff filed an EEOC complaint on 27 May 1980.

12. During the 77-78 academic year, Plaintiff's salary as an instructor was $12,474.

13. During the 78-79 academic year (while serving as a lecturer) Plaintiff's salary was $13,222.

14. During the 79-80 academic year (while serving as a lecturer) Plaintiff's salary was $13,883.

15. The normal course load for faculty members, in the Business Department, at ECSU is twelve hours.

16. During the fall semester of 78, Plaintiff's course load was fifteen hours.

17. During the spring 79, fall 79, and spring 80 semesters, Plaintiff's course load was twelve hours.

18. Plaintiff's salary was at the low

end of the salary range for these academic years.

19. Based on statistical evidence submitted, there was no statistically significant difference between the salaries paid Asians and the salaries paid Blacks, during the 78-79 or 79-80 academic year.

20. Plaintiff presented no evidence of gender discrimination by the Defendants.

DISCUSSION

Title VII of thef Civil Rights Act, 42 USC Secs 2000e-2000e-17, proscribes employment discrimination on account of race, color, religion, sex, and national origin. The Act provides, in part, that

> It shall be an unlawful employment practice for an employer-
>
> (2) To limit, segregate, or classify his employees...in any way which would deprive, or tend to deprive, any individual of employment opportunities, or otherwise adversely effect his [or her] status as an employee, because of such individual's race, color, religion, sex, or

national origin.

42 USC Sec 2000e-2.

Where an employee alleges that she has been treated less favorably than her peers, because of her race or national origin, her Title VII action is considered a disparate treatment suit. This is such a case. Plaintiff has alleged that Defendants denied her a comparable salary and more favorable work assignments because of her race, sex, and/or national origin.

Plaintiff has alleged that these discrimnatory practices occurred on a continuing basis, throughout her employment at ECSU. Title 42, United States Code, Sec 2003-5(g) provides, in part, that

> Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.

See also Albemarle Paper Co. v. Moody, 422 U.S. 405, 410 n.3 (1975). "This provision does not limit the availability of back

pay, but it does limit the extent to which that remedy may be afforded." Patterson v. Youngstown Sheet & Tube Co., 659 F.2d 736, 740 (7th Cir. 1981). Accordingly, as conceded by Plaintiff at trial, the Plaintiff may only recover, if there is evidence that discriminatory practices occurred and/or continued within the limitations period.

> In order for a Plaintiff to prevail in a Title VII action, the court must first find that Plaintiff has proved a prima facie case by a preponderance of the evidence.
>
> As used in the Title VII context, the phrase "prima facie case" refers to the "establishment of a legally mandatory, rebuttable presumption," rather than the presentation of "enough evidence to permit the trier of fact, to infer the fact at issue."

C. Richey, Manual on Employment Discrimination Law and Civil Rights Actions in the Federal Courts (Federal Judicial Center Rev. Ed. 1984), p.A-35 (emphasis in original) quoting Texas Dept. of Community

Affairs v. Burdine, 450 U.S. 248, 254, n.7 (1981). Generally, "[a] determination as to whether a Plaintiff has proved a prima facie case of discrimination is made only after considering the evidence, adduced by both parties." Richey, p.A-36, citing EEOC v. E.I.Dupont de Nemours & Co., 445 F. Supp. 223 (D. Del. 1978). Such was not necessary in this case, because Plaintiff's own proof defeated her claim. Plaintiff's statistical evidence, on its face, showed no statistically significant difference in the salary paid Blacks and that paid Asians. As such, it was not necessary for Defendants to present evidence, challenging Plaintiff's statistical evidence. This element of Plaintiff's case is discussed more fully infra.

In order to prevail, Plaintiff must prove

(1) That she belongs to a

protected minority;

(2) That she was qualified for her position; and

(3) That despite these qualifications, Plaintiff was treated less favorably than her peers, because of her race, sex, or national origin.

As adapted from McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Plaintiff has presented evidence and there is no dispute that Plaintiff is a member of a protected minority and has, therefore, established the first element. Despite contrary testimony by adverse witnesses, Plaintiff has also presented evidence that she was qualified for her position and was performing adequately.

Plaintiff has failed, however, to present evidence, sufficient to establish the third element, necessary to establish a prima facie case. In an attempt to establish that, despite her qualifications,

Plaintiff was treated less favorably than Black members of the faculty at ECSU. Plaintiff testified on her own behalf, and presented statistical evidence. Plaintiff's testimony indicated that, with the exception of one semester, she was carrying the normal course load for a faculty member of the Business Department at ECSU. Plaintiff's testimony also indicated that the salary she received was lower than many other members of the Business Department.

In an attempt to demonstrate that the difference in Plaintiff's salary was based on illegitimate motives, Plaintiff presented a statistical report and the testimony of an expert. As already noted, the statistical evidence presented, indicates that there is no statistically significant difference in the salaries paid Asians and those paid Blacks, within the relevant time period.

This evidence was critical, because Plaintiff failed to offer sufficient evidence of discriminatory intent. In this type of Title VII action, a Plaintiff must prove discriminatory animus, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981), and while a Plaintiff may establish a prima facie case of disparate treatment, without acutal proof of intent, International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977), she must offer some evidence, from which intent may be inferred. Plaintiff's statistical evidence fails to provide a basis for inferring discriminatory animus.

Accordingly, the court now makes the following

CONCLUSIONS OF LAW

1. Plaintiff has established the first two elements, necessary for a prima facie case, under Title VII of the Civil

Rights Act.

2. Plaintiff has failed to establish the third and most critical element that "despite her qualifications, Plaintiff was treated less favorably than her peers, because of her race or national origin."

3. Plaintiff has failed to make out a prima facie case of disparate treatment, under Title VII of the Civil Rights Act.

This action is dismissed and the clerk is hereby directed to enter judgment for the Defendants.

This 22nd May 1989.

W. EARL BRITT
United States District Judge

Filed March 24, 1989

STATUTES INVOLVED

42 USC SEC 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiciton thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured, in an action at law, suit in equity, or other proper proceeding for redress.

42 USC Sec 2000e-2, provides:

> (a) It shall be an unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such indi-

vidual's race, color, religion, sex, or national origin.

42 USC Sec 2000e 5(e), provides:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred...except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a state or local agency..., such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the state or local agency has terminated the proceedings under the state or local law, whichever is earlier...

North Carolina Code, Sec 126-23, provides:

> Each department, agency, institution, commission, and bureau of the state shall maintain a record of each of its employees, showing the following information with respect to each such employee: name, age, date of original employment or appointment to the state service, current position, title, current salary, date and amount of most recent increase or decrease in salary, date of most

recent promotion, demotion, transfer, suspension, separation, or other change in position classification, and the office or station to which the employee is currently assigned. Subject only to rules and regulations for the safekeeping of the records, adopted by the State Personnel Commission, every person having custody of such records shall permit them to be inspected and examined and copies thereof made by any person during regular business hours. Any person who is denied access to any such record for the purpose of inspecting, examining or copying the same shall have a right to compel compliance with the provisions of this section by application to a court of competent jurisdiction for a writ of mandamus or other appropriate relief. (1975, c. 257, s. 1; c. 667, s. 2.)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
ELIZABETH CITY DIVISION

Mumtaz Bano Khan, Appellant,

vs CA-82-39-CIV-2

Jimmy R. Jenkins, et al,

Appellees.

MOTION FOR LEAVE TO CONDUCT
FURTHER DISCOVERY

COMES NOW the Plaintiff, Mumtaz Bano Khan, by counsel, and advises the Court that the above matter has recently been remanded to this Honorable Court from the U.S. Court of Appeals for the Fourth Circuit, and that the Plaintiff plans to retain an expert witness to review statistical evidence and testify on her behalf, and she verily believes that further discovery is necessary to her case, and also further believes and asserts that the Defendants have not fully responded to motions to produce and interrogatories

herein earlier served upon them by the Plaintiff. The Plaintiff respectfully requests the Court for leave to conduct such additional discovery, and to allow additional time to obtain complete responses from the Defendants to her earlier discovery requests, before the said case is reset for trial.

MUMTAZ B. KHAN

Filed March 24, 1988

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
ELIZABETH CITY DIVISION

Mumtaz Bano Khan, Plaintiff

v. CA-82-39-CIV-2

Jimmy R. Jenkins, et al,

Defendants

O R D E R

This matter is before the Court on the Plaintiff's motion for leave to conduct further discovery. The Defendants oppose this motion.

This case has a protracted history. More than abundant discovery has already been provided the Plaintiff. The Plaintiff's claims before this Court are her claims, under 42 USC Secs 1981 and 1983, of unequal pay and unequal work assignments. Khan v. Jenkins, (4th Cir., March 19, 1987) (UP).

The Plaintiff seeks a carte blanche discovery order. This request is DENIED,

without prejudice to the Plaintiff submitting to the Court for approval, a proposed discovery schedule, setting forth, with specificity, the discovery desired, including the number of interrogatories, requests for production, and certification of counsel, that it is not duplicative of any prior discovery request. If Plaintiff's counsel so desires to submit such a discovery schedule, they shall submit same on, or before, May 9, 1988. The Defendants shall have ten days thereafter, within which to respond to the proposed discovery schedule.

THIS ORDER ENTERED, this the 19th day of April, 1988.

CHARLES K. McCOTTER, JR.
United States Magistrate

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
ELIZABETH CITY DIVISION

Mumtaz Bano Khan, Appellant,

vs CA-82-39-CIV-2

Jimmy R. Jenkins, et al,

Appellees.

PROPOSED DISCOVERY SCHEDULE OF PLAINTIFF

The Plaintiff respectfully proposes the following schedule for discovery:

1. That the Plaintiff be allowed to submit ten additional interrogatories.

2. That the Plaintiff be allowed to submit a motion to produce, specifying seven classes of documents or items.

The interrogatories and production would relate to the particulars of work assignments, rates of pay, pay raises and increases, actual salary or pay recieved, job and position description, class and section assignments, class enrollments, extra duties of faculty and administration,

scheduled duties, and factors generally relevant in fixing pay: qualifications, experience, length of employment.

The certificate of counsel accompanying the interrogatories and production request, would specify how any matter, not new, was not fully answered or produced in the past.

Of particular importance to the Plaintiff, is the actual payroll, salary, or pay of individual faculty members. In the past, the Defendants have produced BD-119s in response to this request. Inspection of these does not produce clear and reliable or inclusive information. An individual can be paid out of diverse positions in different departments; raises can be given after they are generated; the date of the raise is not reflected, nor are the actual earnings during the year.

It is proposed that the Plaintiff

submit any interrogatories or production request prior to June 13, with the Defendants having 30 days to respond. This period is specified because it is known that both counsel for the Plaintiff and Defendants are involved in another employment case, approaching trial at this time.

MUMTAZ BANO KHAN

By _____
Oldric J. LaBell, Jr.

Filed May 9, 1988

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
ELIZABETH CITY DIVISION

Mumtaz Bano Khan, Plaintiff

v. CA-82-39-CIV-2

Jimmy R. Jenkins, et al,

Defendants

O R D E R

The Plaintiff's motion for leave to conduct further discovery is DENIED. On April 19, 1988, the Court denied this request, without prejudice to the Plaintiff's submitting, for court approval, a proposed discovery schedule, setting forth, with specificity, the discovery desired and a certification of counsel, that it is not duplicative of any prior discovery request. On May 9, 1988, Plaintiff's counsel submitted a proposed discovery schedule. Plaintiff's proposed schedule does not contain a certification that discovery is not duplicative. Plaintiff has had bountiful dis-

covery in this case, and has failed to specify why additional discovery is needed.

THIS ORDER ENTERED, this the 17th day of May, 1988.

CHARLES K. McCOTTER, JR.
United States Magistrate

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
ELIZABETH CITY DIVISION

Mumtaz Bano Khan, Appellant,

vs CA-82-39-CIV-2

Jimmy R. Jenkins, et al,

Appellees.

This matter is before the court on appeal by Plaintiff, from an order, entered on 17 May 1988, by Magistrate Charles K. McCotter, Jr.

Following remand of this case, from the United States Court of Appeals, for the Fourth Circuit, Plaintiff, on 24 March 1988, filed a motion for leave to conduct further discovery. After response by Defendants' Magistrate McCotter, noting that during the protracted history of this case, Plaintiff has been provided "more than abundant discovery," denied the motion "without prejudice to the Plaintiff submitting to the Court, for approval, a proposed

discovery schedule, setting forth, with specificity, the discovery desired, including the number of interrogatories, requests for production, and certification of counsel, that it is not duplicative of any prior discovery request." Plaintiff filed a "Proposed Discovery Schedule of Plaintiff", on 9 May 1988. In his order of 17 May 1988, Magistrate McCotter found that the proposed schedule did not comply with his prior order, in that it did not contain a certification that discovery is not duplicative, and that Plaintiff failed to specify why additional discovery is needed. The court agrees and Magistrate McCotter's order, of 17 May 1988, is hereby affirmed.

This 6th June 1988.

W. EARL BRITT
United States District Judge

Filed June 7, 1988

April 19, 1982

TO: Dr. Jimmy R. Jenkins
Vice Chancellor for Academic Affairs

FR: Dr. John H. Carson, Chairman

RE: Retention of Mrs. Evelyn Roberts

Mrs. Evelyn Roberts was appointed Assistant Professor in the Business & Economics Dept., prior to the Consent Decree between the University of North Carolina General Administration and U.S. Education Dept. Mrs. Roberts situation has changed substantially however, since her promotion. Consequently, I do not feel that we should continue Mrs. Roberts beyond the 82-83 year. Mr reasons are as follows:

1) A memo to University Chancellors, from Dr. Raymond H. Dawson, dated October 22, 1981, states, "In accordance with President Friday's memo of this date, I am writing to set out these understnadings and applications of the provisions of the Consent Decree, that pertains to terminal degrees for faculty appointments.

    a. Consistent with the definitions and other commitments in Sec VII of the Decree, that pertain to faculty, Sec VII-9-a (the "terminal degree provision") applies to all appointments of full-time faculty members, who are paid in whole, or in part, from budget purpose 101-1210. Appointments include initial appointments and any sebsequent appointments."

Mrs. Roberts does not meet the standard for academic credentials, as established by the Consent Decree, and it is unlikely that she will ever be able to meet this provision. She is not presently enrolled in a doctorate program, nor is it likely that she would pursue the degree, if she were enrolled.

b. Mrs. Roberts is a Business Education teacher, and should teach only Business Education and related courses, (such as typewriting, shorthand, and office practice). The number of Business Education majors has been shrinking and, consequently, her student load is well below that of other members of the departmental faculty. In the fall of 1981, it was necessary of ___ assigned her an additional course to augment her student load.

c. I have received several complaints that Mrs. Roberts was inebriated, while in class and was not coherent enough to teach her classes. I have talked to her, while she was in this state of incoherence, and was aware of an odor of an alcoholic beverage. I discussed this problem with Mrs. Roberts on February 12, 1982. A transcript of that conference is attached.

August 22, 1977

Marion D. Thorpe, Chancellor
ECSU
Elizabeth City, NC 27909

Dear Ms. Thorpe:

At its meeting on August 21. the Personnel & Tenure Committee considered again, your recommendation that Ms. Venus Deonanan be promoted to asst. professor, and be awarded permanent tenure.

The Comittee noted that, although the Union Graduate School is licensed by the Ohio Board of Regents, it is not accredited, according to the information sent here. Further, the Committee noted that Ms. Deonanan is a candidate for the doctorate, but that she has not completed her doctoral studies.

Accordingly, the Committee has declined to recommend the conferral of permanent tenure. On the basis of my understanding of Ms. Deonanan's status, under your tenure regulations, there is no requirement for a tenure decision at this time. The Committee concurs in your recommendation that the promotion of Ms. Deonanan to asst. Professor be approved.

Please let me know, if you need any additional information.

Sincerely yours,

Raymond H. Dawson

November 29, 1978

Dr. Jimmy R. Jenkins
Vice Chancellor - Academic Affairs
Campus

Dear Dr. Jenkins:

Your letter of November 29, 1978 to Dr. Khan, in which you state, in considerable detail, the rationale as to why his salary for the academic year 78-79 is what it is, is more than adequate and is legally sufficient. However, past experiences and dealings with Dr. Khan indicate that it is extremely doubtful that he will accept your response to his inquiry.

Dr. and Mrs. Khan, indeed, are a most troublesome, bothersome, and unusual pair of University employees. The can rationalize any act, action, or decision by any University administrator that happens to cnflice with their own moral values and interpretation of events, as being discriminatory, on their face. Yet, these do-called charges and renunciations of discrimination are without substantial merit, and based on hearsay and inuendo.

I fail to understand how any University employee can be so critical and espouse so much negatism aout his employer and his immediate superiors, in particular. No individual is forced or coerced to remain in the University's employ, or better still, the Univeristy does not force employees to remain with the Institution.

In the future, I suggest and strongly recommend that University employees, who conduct themselves, for a sustained period

of time, in a manner similar to that of the Khans, should be dismissed and/or terminated at the University's earliest convenience. Finally, under no circumstances should this category of employee be awarded permanent tenure status.

Sincerely yours,

James E. Brown
Admin. Asst.- Legal

ELIZABETH CITY STATE UNIVERSITY

April 25, 1983

TO: Dr. Jimmy R. Jenkins, Vice Chancellor, Academic Affairs

FROM: J.H. Carson, Chairman

RE: Mr. Dandeson Panda

It is my recommendation that Mr. Panda be given a terminal 1983-84 contract with the understanding that if he is accepted in an accredited Ph.D. program in Business, he will be given top priority for reemployment when he has completed the program or has made substantial progress toward the Ph.D. program.

Table 5

Black vs non-Black

Year	Variable	Estimate	Standard Error of Estimate	Number of S.E.'s from 0	p-value	
1971	non-Black	$165.93	$324.85	.51	.6111	Not different from zero
1972	non-Black	-696.02	274.33	-2.54	.0135	
1973	non-Black	-734.06	320.80	-2.29	.0252	
1974	non-Black	-898.72	359.64	-2.50	.0151	
1975	non-Black	-925.11	336.34	-2.75	.0075	
1976	non-Black	-1628.67	428.71	-3.80	.0003	
1977	non-Black	-1530.30	494.29	-3.10	.0027	
1978	non-Black	-871.76	488.22	-1.79	.0781	Not different from zero
1979	non-Black	-1690.48	565.02	-3.00	.0036	

Table 4

Estimates of Effects for Each year

Variable	Estimate	Standard Error of Estimate	Number of S.E.'s from 0	p-value	
1971-72	**R^2=.8352**				
Base	$8,563.62	$328.25	26.09	.0001	
White	$61.18	$383.21	0.16	.8736	Not different from zero
Asian	$274.95	$387.55	0.71	.4805	Not different from zero
Asst. Prof.	$794.07	$333.91	2.38	.0202	
Assoc. Prof.	$2,619.39	$404.67	6.47	.0001	
Full Prof.	$5,339.57	$374.43	14.26	.0001	
Bus./Econ.	$353.99	$520.28	0.68	.4986	Not different from zero
Female	-$8.99	$275.24	-0.03	.9740	Not different from zero
11/12 month	$1,595.48	$661.94	2.41	.0186	
Years at ECSU	$127.52	$38.68	3.30	.0016	

1972-73	R^2=.8530				
Base	$9,905.00	$297.40	33.30	.0001	
White	-$793.74	$355.97	-2.23	.0291	
Asian	-$622.99	$323.10	-1.93	.0581	Not different from zero
Asst. Prof.	$967.85	$324.96	2.98	.0040	
Assoc. Prof.	$2,563.91	$364.24	7.04	.0001	
Full Prof.	$5,635.04	$334.71	16.84	.0001	
Bus./Econ.	$424.08	$407.39	1.04	.3016	Not different from zero
Female	-$448.89	$265.34	-1.69	.0953	Not different from zero
11/12 month	-$144.22	$788.85	-0.18	.8555	Not different from zero
Years at ECSU	$58.81	$33.71	1.75	.0857	Not different from zero

Table 5

Black vs non-Black

Year	Variable	Estimate	Standard Error of Estimate	Number of S.E.'s from 0	p-value	
1971	non-Black	$165.93	$324.85	.51	.6111	Not different from zero
1972	non-Black	-696.02	274.33	-2.54	.0135	
1973	non-Black	-734.06	320.80	-2.29	.0252	
1974	non-Black	-898.72	359.64	-2.50	.0151	
1975	non-Black	-925.11	336.34	-2.75	.0075	
1976	non-Black	-1628.67	428.71	-3.80	.0003	
1977	non-Black	-1530.30	494.29	-3.10	.0027	
1978	non-Black	-871.76	488.22	-1.79	.0781	Not different from zero
1979	non-Black	-1690.48	565.02	-3.00	.0036	

Table 4 (continued)

Estimates of Effects for Each year

Variable	Estimate	Standard Error of Estimate	Number of S.E.'s from 0	p-value	
1973-74	R^2=.8471				
Base	$9,887.00	$346.42	28.54	.0001	
White	-$615.34	$378.99	-1.62	.1092	Not different from zero
Asian	-$883.59	$408.56	-2.16	.0341	
Asst. Prof.	$1,159.92	$364.89	3.18	.0022	
Assoc. Prof.	$2,845.11	$445.33	6.39	.0001	
Full Prof.	$6,431.15	$402.65	15.97	.0001	
Bus./Econ.	$868.77	$477.32	1.82	.0732	Not different from zero
Female	-$460.21	$294.28	-1.56	.1226	Not different from zero
11/12 month	$2,707.49	$611.68	4.43	.0001	
Years at ECSU	$61.40	$38.43	1.60	.1148	Not different from zero

1974-75	R^2=.8591				
Base	$10,630.00	$416.75	25.51	.0001	
White	-$647.42	$417.48	-1.55	.1261	Not different from zero
Asian	-$1,286.04	$487.02	-2.64	.0105	
Asst. Prof.	$1,357.23	$407.43	3.33	.0015	
Assoc. Prof.	$3,144.19	$498.62	6.31	.0001	
Full Prof.	$7,038.72	$440.04	16.00	.0001	
Bus./Econ.	$861.34	$555.65	1.55	.1263	Not different from zero
Female	-$452.88	$321.79	-1.41	.1644	Not different from zero
11/12 month	$2,801.22	$676.47	4.14	.0001	
Years at ECSU	$90.75	$41.47	2.19	.0325	

Table 4 (continued)

Estimates of Effects for Each year

Variable	Estimate	Standard Error of Estimate	Number of S.E.'s from 0	p-value	
1975-76	R^2=.8516				
Base	$10,473.00	$382.43	27.39	.0001	
White	-$884.49	$407.94	-2.17	.0335	
Asian	-$976.87	$445.76	-2.19	.0317	
Asst. Prof.	$1,512.85	$396.28	3.82	.0003	
Assoc. Prof.	$4,195.10	$456.18	9.20	.0001	
Full Prof.	$7,703.75	$455.11	16.93	.0001	
Bus./Econ.	$526.42	$525.65	1.00	.3200	Not different from zero
Female	-$269.78	$318.28	-0.85	.3994	Not different from zero
11/12 month	$2,431.94	$624.38	3.90	.0002	
Years at ECSU	$65.77	$34.80	1.89	.0628	Not different from zero

1976-77	R^2=.8305				
Base	$11,561.00	$490.86	23.55	.0001	
White	-$1,200.61	$529.96	-2.27	.0268	
Asian	-$2,044.31	$524.79	-3.90	.0002	
Asst. Prof.	$1,429.43	$473.05	3.02	.0036	
Assoc. Prof.	$3,782.04	$590.21	6.41	.0001	
Full Prof.	$7,666.56	$529.64	14.48	.0001	
Bus./Econ.	$588.00	$583.01	1.01	.3169	Not different from zero
Female	-$593.20	$396.26	-1.50	.1392	Not different from zero
11/12 month	$1,780.03	$673.35	2.64	.0103	
Years at ECSU	$85.11	$40.43	2.11	.0391	

Table 4 (continued)

Estimates of Effects for Each year

Variable	Estimate	Standard Error of Estimate	Number of S.E.'s from 0	p-value	
1977-78	R^2=.7290				
Base	$12,940.00	$532.49	24.30	.0001	
White	-$1,211.70	$566.61	-2.14	.0354	
Asian	-$1,995.32	$639.37	-3.12	.0025	
Asst. Prof.	$1,992.04	$538.39	3.70	.0004	
Assoc. Prof.	$4,370.66	$747.81	5.85	.0001	
Full Prof.	$7,946.47	$682.89	11.64	.0001	
Bus./Econ.	$897.88	$680.94	1.32	.1909	Not different from zero
Female	-$840.26	$474.88	-1.77	.0805	Not different from zero
11/12 month	$1,670.95	$699.94	2.39	.0192	
Years at ECSU	$74.76	$42.68	1.75	.0835	Not different from zero

1978-79	R^2=.7072				
Base	$13,534.00	$667.47	20.35	.0001	
White	-$834.53	$576.20	-1.45	.1516	Not different from zero
Asian	-$923.33	$644.34	-1.43	.1560	Not different from zero
Asst. Prof.	$2,845.34	$613.36	4.64	.0001	
Assoc. Prof.	$6,109.25	$773.59	7.90	.0001	
Full Prof.	$8,657.47	$768.47	11.27	.0001	
Bus./Econ.	$360.79	$728.53	0.50	.6219	Not different from zero
Female	-$322.01	$513.49	-0.63	.5325	Not different from zero
11/12 month	$1,671.53	$855.67	1.95	.0544	Not different from zero
Years at ECSU	$17.24	$43.84	0.39	.6953	Not different from zero

Table 4 (continued)

Estimates of Effects for Each year

Variable	Estimate	Standard Error of Estimate	Number of S.E.'s from 0	p-value	
1979-80	**R^2=.6931**				
Base	$14,290.00	$698.20	20.47	.0001	
White	-$1,894.10	$633.42	-2.99	.0036	
Asian	-$1,258.17	$826.11	-1.52	.1315	Not different from zero
Asst. Prof.	$3,898.93	$700.35	5.57	.0001	
Assoc. Prof.	$6,565.02	$814.09	8.06	.0001	
Full Prof.	$10,452.00	$876.22	11.93	.0001	
Bus./Econ.	$737.52	$747.80	0.99	.3268	Not different from zero
Female	-$710.06	$558.32	-1.27	.2069	Not different from zero
11/12 month	$1,184.18	$865.42	1.37	.1748	Not different from zero
Years at ECSU	$6.40	$44.06	0.15	.8849	Not different from zero

Table 6

Salary Levels for Khan

Year	Actual	Predicted	Range	Standard Error
72	$8,334	$9,939	$7,748–$12,129	$1,097
73	8,667	10,419	7,957–12,880	1,233
74	9,600	11,311	8,570–14,051	1,370
75	9,703	10,993	8,199–13,786	1,401
76	10,431	11,981	8,835–15,128	1,576
77	12,474	13,446	9,390–17,502	2,039
78	13,222	13,743	9,494–17,993	2,134
79	13,883	14,369	9,403–19,335	2,498

Supreme Court, U.S.
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(2)

No. 90-414

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1990 TERM

MUMTAZ BANO KHAN,
Petitioner

V.

JIMMY R. JENKINS, JOHN H. CARSON, MARION D. THORPE, ELIZABETH CITY STATE UNIVERSITY,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

I. MUST AN ASIAN AMERICAN FACULTY MEMBER PROVE THAT SHE IS AS QUALIFIED AS HIGHER PAID BLACK FACULTY IN ORDER TO MAKE OUT A PRIMA FACIE CASE OF DISCRIMINATION IN SALARY UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 OR THE FOURTEENTH AMENDMENT?

II. DOES A DISTRICT COURT JUDGE HAVE THE DISCRETION TO DENY A PLAINTIFF FURTHER DISCOVERY WHEN THE PLAINTIFF FAILS TO COMPLY WITH THE COURT'S DISCOVERY ORDERS?

III. IS A PLAINTIFF ENTITLED TO A NEW TRIAL ON GROUNDS THAT SHE WAS DENIED FURTHER DISCOVERY OF HER EMPLOYER'S EMPLOYMENT RECORDS DESPITE THE FACT THAT THE DECISION TO DENY HER ACCESS TO THOSE RECORDS WAS HARMLESS?

III. IS AN ASIAN AMERICAN PLAINTIFF ENTITLED TO INTRODUCE STATISTICAL EVIDENCE WHICH INDICATES DISPARITIES IN THE SALARIES PAID BLACK AND NON-BLACK FACULTY WHEN (1) THOSE DISPARITIES ARE NOT LEGALLY SIGNIFICANT DURING THE RELEVANT PERIOD AND (2) THE PLAINTIFF'S STATISTICAL EVIDENCE SHOWED NO STATISTICALLY SIGNIFICANT DISPARITY IN THE SALARIES PAID BLACK AND ASIAN AMERICAN FACULTY?

IV. DID THE TOTALITY OF THE PLAINTIFF'S EVIDENCE RAISE AN INFERENCE OF RACE DISCRIMINATION SUFFICIENT TO OVERCOME THE DEFENDANTS' MOTION TO DISMISS?

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No. 90-414

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER 1990 TERM

MUMTAZ BANO KHAN,
Petitioner

V.

JIMMY R. JENKINS, JOHN R. CARSON, MARION D. THORPE, ELIZABETH CITY STATE UNIVERSITY,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION

STATEMENT OF THE CASE

In this case the petitioner, an Asian American and a former member of the Elizabeth City State University (ECSU) Department of Business and Economics, claimed that the respondents, ECSU, Dr. Jimmy Jenkins, ECSU Vice-Chancellor for Academic Affairs, and Dr. John Carson, Chairman of the ECSU Department of Business and Economics, denied her a higher salary because of her race in violation of her rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. and the fourteenth amendment and 42 U.S.C. § 1983. Petitioner's claims against respondent Dr. Thorpe were dismissed before trial on grounds that petitioner had failed to file a claim against his estate following his

death. At trial the district court granted respondents' motions to dismiss at the conclusion of the petitioner's evidence on grounds that the petitioner had failed to make out a prima facie case of race discrimination. (Appendix to Petition, 29-40; hereinafter App. __). The United States Court of Appeals for the Fourth Circuit subsequently affirmed that decision. (App. 3-27).

SUMMARY OF ARGUMENTS

In this brief the respondents argue that the Court should not grant the petition for writ of certiorari because the petitioner has failed to show that the decision below is in conflict with any applicable decision of this Court or any other circuit and has failed to show any other special or important reason for granting the writ.

I.

The court of appeals properly adapted the prima facie case described in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) to the allegations and employment practice at issue in this case. In particular, given the fact that the case involved allegations of discrimination in the salaries paid university faculty, the court of appeals properly required petitioner to prove as one element of her prima facie case that she was paid less than other faculty comparably qualified in terms of education and rank. Although the petitioner claims that the court of appeals' description of the applicable prima facie case is in conflict with that used in other circuits, review of the allegedly conflicting precedents shows that those decisions did not involve professional personnel. Moreover, proof the the petitioner was paid less than Black faculty comparably qualified in terms of education and rank is necessary to eliminate the most common reasons for differences in salaries paid university faculty.

II.

The court of appeals did not err when it affirmed the district court's decision to deny the petitioner further discovery. The proper standard for review of discovery decisions is abuse of discretion. The respondents show the Court that, given the extensive discovery granted the petitioner, the petitioner's failure to comply with the district court's order regarding further discovery, the petitioner's belated attempts to compel further discovery and the petitioner's failure to show that the district court's decision to deny her further discovery limited her ability to develop her statistical evidence, the court of appeals did not err in affirming the district court's decision to deny the petitioner further discovery. The precedents which the petitioner claims to be in conflict with this decision do not present the same issues.

III.

The court of appeals properly affirmed the district court's decision to sustain Dr. Jenkins' and Dr. Carson's objections to the admission of the petitioner's statistical evidence in her claims against them in their individual capacities under 42 U.S.C. § 1983. The court of appeals properly reviewed all the statistical evidence in the context of the facts and issues presented in the case before affirming the district court decision. *See, Watson v. Fort Worth Bank and Trust,* 487 U.S. 977 at 995 n.3 (1988)(statistical evidence must be evaluated on a case-by-case basis). The petitioner's statistical evidence covered the period from 1971-72 to 1979-80. However, the petitioner's claim that she was discriminated against in the years prior to 1979-80 were time barred. In order to prevail in this case, the petitioner was under an obligation to prove that the individual defendants discriminated against her during the 1979-80 academic year, her last at ECSU. Dr. Jenkins and Dr. Carson were not responsible for setting faculty salaries until after the 1977-78 academic year. The statistical evidence for the years 1978-79 and 1979-80 did not reveal a statistically significant difference in the salaries paid Asian and Black

Asian and Black faculty. Moreover, the statistical evidence showed that the difference between the salary paid the petitioner and that paid a hypothetically similarly situated Black member of the ECSU faculty was never statistically significant. Although some of the petitioner's statistics showed larger disparities between the relative salaries paid Blacks and non-Blacks, these disparities were not statistically significant during the relevant period. Furthermore, that evidence was not as pertinent as the statistical evidence regarding the relative salaries paid Asians and Blacks. Given those facts, the court of appeals did not err when it determined that the district court did not abuse its discretion when it sustained the individual respondents' objections to the petitioner's statistical evidence.

IV.

The court of appeals did not err when it determined that the record as a whole did not prove a prima facie case against any of the respondents. In this argument, the respondents show the Court that considered in its entirety the statistical evidence was insufficient to raise an inference of discrimination, that the petitioner failed to show that she was paid less than any comparably qualified Black faculty members, and that the petitioner failed to show that the respondents discriminated against the petitioner or any other Asian faculty member in any of their employment decisions.

REASONS WHY WRIT SHOULD NOT ISSUE

I. THE COURT OF APPEALS APPLIED THE PROPER STANDARD FOR DETERMINING WHETHER THE PETITTIONER HAD ESTABLISHED A PRIMA FACIE CASE OF DISCRIMINATION IN SALARY.

The petitioner claimed that the respondents discriminated against her in terms of her salary in violation of her rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. § 1983. At the conclusion of the petitioner's evidence, the district court granted the respondents' motions to dismiss on grounds that the petitioner had failed to establish a prima case of discrimination. The court of appeals affirmed that decision. The petitioner now claims that the Court should review that decision on grounds that the court of appeals' description of the elements of a prima facie case of salary discrimination differ from those required by other circuits. An examination of the court of appeals' decision shows that it properly defined the petitioner's initial burden of proof and that any differences between the prima facie case described in the court of appeals' decision and that described by other circuits does not merit this Court's review.

In *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) this Court first described the now familiar four step proof which permits a plaintiff to establish a prima facie case of discrimination without direct proof of discrimination. In *McDonnell Douglas* this Court held that when the plaintiff alleges he was denied employment in violation of rights secured under Title VII he may establish a prima facie case "by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *Id.* at 802. If the plaintiff proves these elements, he satisfies his initial

obligation to present sufficient circumstantial evidence to show that the decision to deny him employment or some benefit of employment "did not result from the two most common legitimate reasons on which an employer might rely to reject a job application: an absence or relative lack of qualifications or absence of a vacancy in the job sought." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 n. 4 (1977).

The specific elements of a *McDonnell Douglas* prima facie vary depending on the particular fact situation and employment practice at issue. *McDonnell Douglas v. Green*, 411 U.S. 792 at 802 n. 3. In the context of alleged salary discrimination, the Fourth Circuit Court of Appeals has held that proof of a *McDonnell Douglas* prima facie case requires not only proof of a disparity between salaries paid employees of different races but also proof that the plaintiff was equally qualified to receive the higher salary. *Bazemore v. Friday*, 751 F.2d 662, 670 (4th Cir. 1984), *rev'd per curiam on other grounds*, 478 U.S. 385 (1986). Therefore, under the Fourth Circuit's decisions, the plaintiff who seeks to establish a *McDonnell Douglas* prima facie case of salary discrimination must present evidence "to show: (1) that she is a member of a protected class; (2) that she is as qualified as employees not of the protected class; and (3) that she was paid less than these other comparably qualified employees." (App. 15).

The Fourth Circuit's emphasis on the plaintiff's obligation to prove her relative qualifications for a higher salary is entirely consistent with this Court's holding in *McDonnell Douglas*. The purpose of the prima facie case as described in *McDonnell Douglas* is to eliminate the most common legitimate reasons for an employment decision. *See, International Brotherhood of Teamsters v. United States*, 431 U.S. at 358 n. 4 (1977). Absent evidence of her relative qualifications for the higher salary the plaintiff must necessarily fail to carry her initial burden of proving that her employer's salary decisions did not result from the most common legitimate reasons on which an employer might

rely to pay employees different salaries, i.e. a difference in their relative qualifications. *Id.* In fact, this Court has implicitly recognized that proof of one qualification, i.e., that the plaintiff held a position comparable to the favored white employee, is a necessary element of a prima facie case of salary discrimination. *Bazemore v. Friday*, 478 U.S. 385, 403 (1986)(Brennan, J., concurring).

The petitioner claims that to prove her prima facie case of discrimination in salary she should only need to prove that she was paid less for performing substantially the same job as persons of a different race. The petitioner claims that to the extent that the Fourth Circuit requires more, its decision is in conflict with the decisions in *Uviedo v. Steves Sash & Door Co.*, 738 F.2d 1425 (5th Cir. 1984), *Pittman v. Hattiesburg Municipal Separate School District*, 644 F.2d 1071 (5th Cir. 1981), and *Katz v. School District of Clayton, Mo.*, 557 F.2d 153 8th Cir. 1977). Examination of those decisions does not support the petitioner's claim.

First, an examination of those cases shows that, unlike the petitioner in this case, none of the plaintiff's were college faculty. In *Uviedo* the plaintiff was a clerical worker, in *Pittman* the plaintiff was a printer, and in *Katz* the plaintiff was a teacher's assistant. When a discrimination claim is brought by a nonprofessional employee, one might reasonably assume that the only qualification for a particular salary would be the ability to do the same work. In academia, however, all faculty teach, conduct research and serve on committees. Under those circumstances, one's salary is dependent not on the type of work performed, but rather on one's education, experience, rank, performance and field of expertise. *Cf., Bazemore v. Friday*, 478 U.S. at 398-401 (probative value of salary regression analysis extension service personnel dependent on control for factors such as education, job title, tenure and job performance). In fact, the petitioner's own expert found a positive correlation in this case between a faculty member's time in service and rank.

Therefore, to the extent that the cases cited by petitioner describe a different prima facie case for claims of discrimination in salary under Title VII and 42 U.S.C. § 1983, that difference can be ascribed to the fact that the cases did not involve college faculty. In fact, failure to account for differences in setting salaries of professional and nonprofessional employees would be contrary to this Court's note in *McDonnell Douglas v. Green*, 411 U.S. 792 at 802 n.3, that the elements of a Title VII prima facie case will necessarily vary in differing factual situations.

Aside from the fact that the present case involves professional personnel, the cases cited by the petitioner can be distinguished on other grounds. *Katz*, for example, did not involve a claim under either Title VII or 42 U.S.C. § 1983. Instead, the plaintiff in *Katz* alleged a violation of her rights under the Equal Pay Act, 29 U.S.C. 206, *et seq*. *Pittman* and *Uviedo* involved Title VII claims but the courts relied upon Equal Pay Act precedents when stating the elements of a prima facie case for salary discrimination. There is a significant difference between a claim under the Equal Pay Act and a claim under Title VII and the courts' failure to account for that difference when describing the elements of a prima facie case caused them to stray from the principles of *McDonnell Douglas*.

In an action brought under the Equal Pay Act the plaintiff's only burden is to prove that she was paid less than a man "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). Once the Equal Pay Act plaintiff carries that burden, the employer has the burden of proving that the wage differential was based on some factor other than sex. *Id.* at 197. These burdens differ significantly from a disparate treatment claim under Title VII or an equal protection claim under 42 U.S.C. § 1983. In those cases, the plaintiff bears the burden of proving

that she has been the victim of intentional discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981); *Washington v. Davis*, 426 U.S. 229 (1976); and *Arlington Heights v. Metropolitan Bus Inc.*, 429 U.S. 252 (1977).

In light of this greater burden of proof, the plaintiff in a Title VII action or a 42 U.S.C. § 1983 action must present sufficient evidence in her prima facie case to create an inference of intentional discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 254 (1981). As this Court noted in *Burdine* and *International Brotherhood of Teamsters*, this inference does not arise until the plaintiff has presented at least enough evidence to eliminate the most common nondiscriminatory reasons for the employer's actions. In the context of the salary paid university faculty that proof must include something more than the fact that the plaintiff was employed as a faculty member. Otherwise, a plaintiff's prima facie case would fail to eliminate any of the most common reasons for the differences in faculty salaries. Consequently, even if there is a conflict between the prima facie case as described in the Fourth Circuit's opinion and that described in the cases cited by the petitioner, the Fourth Circuit's formulation is more faithful to the holding and principles of *McDonnell Douglas*.

The petitioner's argument that the court of appeals' decision imposed an unnecessarily heavy burden on her fails to account for several significant differences between the circumstances of her employment and those of her allegedly comparable colleagues in the Business and Economics Department during the 1979-80 academic year.

Petitioner claims that the disparity between her salary and that of Ms. Roberts, a Black female, is indicative of discrimination. The record, however, shows that after being hired Ms. Roberts attended the University of North Carolina at Greensboro where she completed thirty semester hours of study beyond her masters degree. (App. 19). After completing those courses in the

summer of 1979, Ms. Roberts was promoted to Assistant Professor. (App. 19).

Ms. Roberts' record stands in sharp contrast with petitioner's. During the time she was employed at ECSU, petitioner did not attend an accredited institution and made no effort to continue her education until 1976 when she enrolled in a correspondence Ph. D. program at California Western University. (App. 7). While enrolled in California Western University, petitioner did not take thirty semester hours of study and, in fact, received academic credit for her "life experiences." (App. 7). Furthermore, petitioner failed to provide the ECSU administration with an official transcript of her studies at California Western University until after she left ECSU. (App. 7). Without thirty semester hours of study beyond the masters degree, petitioner did not qualify for promotion. (App. 7). Consequently, in order to continue Ms. Khans employment for the 1978-79 academic year, Dr. Jenkins had to demote her from Instructor to Lecturer. (App. 7).

In the spring of 1979, Dr. Carson recommended petitioner's nonreappointment in part because she had failed to earn additional academic credit beyond her masters. Dr. Jenkins accepted that recommendation and in accordance with ECSU regulations issued petitioner a terminal contract for the 1979-80 academic year. (App. 8).

Thus, during the year in question, 1979-80, Ms. Roberts had just been promoted and was serving in her first year as an Assistant Professor. Petitioner, on the other hand, had been demoted the year before and was serving out her final year on the faculty. Given these fundamental dissimilarities between Ms. Roberts and petitioner, the $2686 difference in their 1979-80 salaries will not support an inference of discrimination in salary because it fails to account for common reasons for differences in faculty salaries, i.e rank and performance.

Petitioner's attempt to establish a prima facie case by comparing her salary in 1979-80 to that paid Mr. Dandeson Panda, a Black male first hired in the department for the 1979-80 academic year, also fails. By 1979-80 petitioner had been demoted to Lecturer, a nontenure track position, whereas Mr. Panda was hired that year as an Instructor, an entry level tenure track appointment. (App. 19 and 31). Finally, aside from the fact that Mr. Panda had an M.B.A., petitioner failed to present any evidence which would permit one to determine that she and Mr. Panda were similarly qualified. Therefore, the comparison of petitioner's salary with Mr. Panda's salary fails to create an inference of discrimination.

In summary, the court of appeals properly held that, at least in the context of university faculty, a prima facie case of salary discrimination requires proof that the plaintiff was paid less than "other comparably qualified employees." (App. 15). Furthermore, applying that standard to the facts in the record, the court of appeals properly held that the petitioner had failed to prove that she was paid less than any comparably qualified faculty member. Therefore, this issue does not merit this Court's review.

II. THE DISTRICT COURT'S DECISIONS TO DENY THE PLAINTIFF'S BELATED REQUESTS FOR DISCOVERY AND MOTIONS TO COMPEL AND THE COURT OF APPEALS' DECISION TO AFFIRM THOSE RULINGS DO NOT RAISE ISSUES THAT MERIT THIS COURT'S REVIEW.

The petitioner complains that the court of appeals erred when it affirmed the district court's decisions to deny her further discovery in this case. A review of the whole record shows that there are no special or important reasons for the Court to review the court of appeals' decision on this issue.

During the early course of this litigation, the petitioner served several identical requests for production of documents on the respondents. In those requests she demanded that the respondents produce a massive number of personnel records for the period from 1970 through 1982. In response to the first of those requests, the respondents filed a motion for protective order on April 6, 1983. Between that time and April 11, 1985, the parties engaged in extensive litigation regarding the timeliness of the petitioner's complaint. (App. 9-10). The only cause of action to survive that litigation was petitioner's claim that she had been denied a salary equal to similarly employed men because of her sex in violation of her rights under the Equal Pay Act, 29 U.S.C. § 206, *et seq.*, for the period from December 31, 1979 through May 30, 1980. (App. 10).

Once the complaint had been reduced to that single cause of action, the respondents filed a response to the petitioner's request for production of documents. In that response, the respondents agreed to produce for inspection and copying a large volume of material relevant to petitioner's claim of sex discrimination under the Equal Pay Act. The respondents, however, objected to petitioner's request for documents which noted the race, national origin and citizenship of ECSU faculty members on grounds that, insofar as the Equal Pay claim was limited to alleged sex discrimination, the request exceeded the scope of discovery under Rule 26, F.R. Civ. Pro.

The respondents' objections to discovery were first considered during a pre-trial hearing held on May 8, 1985. At the conclusion of that hearing, the magistrate entered a comprehensive pre-trial order in which he ordered the respondents to produce some additional documents and denied the petitioner's request for other documents. Petitioner initially appealed the magistrate's order to the district court judge. Before that appeal could be heard, however, petitioner, who had been proceeding *pro se* since June of 1984, retained new counsel. After retaining counsel,

petitioner withdrew her appeal of the magistrate's order and it was dismissed as moot.

During a second pre-trial conference held on November 12, 1985, petitioner filed a motion to reconsider the previous rulings on discovery. That motion was denied on grounds that it reiterated numerous matters that the court had previously ruled on and on grounds that it was not timely. Despite the fact that she was represented by counsel, petitioner personally filed a motion to compel discovery on November 26, 1985, approximately a week before the scheduled trial on her Equal Pay Act claims. That motion was denied on grounds that it lacked merit and was not signed by local counsel in violation of Local Rule 2.04 (E.D.N.C.).

The parties then settled petitioner's Equal Pay Act claims. (App. 10). That settlement disposed of the last remaining claim in petitioner's complaint. Therefore, the district court entered judgment on its earlier orders granting the respondents' summary judgment on petitioner's other claims of race, sex and national origin discrimination under Title VII, 42 U.S.C. § 1981 and 42 U.S.C. §1983 and petitioner gave notice of appeal. On appeal, the court of appeals affirmed in part and reversed in part and remanded for trial petitioner's claims that the respondents had discriminated against her on the basis of her race, sex and national origin in terms of her salary and work assignments in violation of Title VII, 42 U.S.C. § 1981 and 42 U.S.C. §1983. Thus, for the first time since the respondents had filed their motion for protective order on April 6, 1983, the respondents did not have a pending objection to petitioner's efforts to pursue discovery on a pending claim of race and national origin.

On March 24, 1988, petitioner filed a motion in which she not only requested leave to conduct further discovery but also asserted that the respondents had not "fully responded to motions to produce and interrogatories herein earlier served upon them." (App. 73) In fact, prior to that date the petitioner had not filed

any interrogatories on any of the respondents. In light of the protracted history of the case and the fact that the petitioner had already been given abundant discovery, the magistrate denied petitioner's request for "a carte blanche discovery order." (App. 46). Instead, the magistrate directed petitioner to submit for the court's approval "a proposed discovery schedule setting forth with specificity the discovery desired, including the number of interrogatories and requests for production and certification of counsel that it is not duplicative of any prior discovery request." (App. 47).

On May 9, 1988, petitioner submitted a proposed discovery schedule. (App. 48-50). That proposed schedule did not comply with the magistrate's order in that it did not set forth with specificity the requested discovery or certify that the requests would not be duplicative of earlier requests. Counsel for petitioner made no attempt to explain why such a certification was not appropriate or why additional discovery was needed. In light of petitioner's failure to comply with his earlier order, the magistrate denied the motion for additional discovery. (App. 51-52). Petitioner appealed that ruling but the district court judge subsequently affirmed the magistrate's decision on June 7, 1989. (App. 53-54).

More than nine months later, after the case had been set for final pre-trial conference and trial, petitioner, without seeking leave of the court, filed a motion to compel discovery, requests to produce, requests for admission and her first set of interrogatories. The parties presented their positions on these belated attempts to secure additional discovery to the magistrate during the pre-trial hearing on April 18, 1989. At the conclusion of the pre-trial hearing, the magistrate entered an order denying the petitioner's motion to compel and her requests for additional discovery. (App. 26). The magistrate expressly found that the petitioner's efforts to secure additional discovery were not timely and would have prejudiced the respondents' preparation of their defense. He also found that the petitioner's discovery requests had been addressed

in no fewer than five previous orders and denied the petitioner's request to reconsider those rulings at that late date. The district court judge subsequently affirmed the magistrate's ruling.

The court of appeals affirmed this decision on grounds that the petitioner had failed to clearly prove that the trial court's decision to deny her belated discovery requests and motion to compel constituted an abuse of discretion. (App. 26). The court of appeals further found that the respondents had provided the petitioner with sufficient material to permit her to develop and present at trial extensive statistical analysis of salaries paid male, female, White, Black and Asian faculty at ECSU. (App. 27 n.9 and 61-72). In light of that fact, the court of appeals found that any error in the district court's decision to deny the petitioner further discovery was harmless. (App. 26).

The petitioner now contends that the court of appeals' decision in this case is in conflict with the decisions in other circuits. In support of this claim the petitioner cites decisions which emphasize Title VII plaintiffs' rights to discover employment data relevant to the development of statistical evidence. The decision in this case, however, does not address the issue of whether Title VII plaintiffs are entitled to broad discovery of employment records. Neither the respondents nor the court of appeals disputed either the petitioner's need for or right to discover relevant employment data. The issue before the court of appeals was whether the trial court had abused its discretion when it ordered the petitioner to submit an appropriate discovery schedule, including a certification that the proposed discovery requests would not be redundant, whether the petitioner failed to comply with the orders on discovery and the harmlessness of the alleged error. An examination of the opinions on which the petitioner relies reveals no conflict on those issues.

In both *Burns v. Thiokol Chemical Corp.*, 483 F.2d 300, 304 (5th Cir. 1973) and *Trevino v. Celanese Corp.*, 701 F.2d 397, 406 (5th Cir. 1983) the Fifth Circuit Court of Appeals emphasized

the trial court's broad discretion in matters of discovery. A notable factor in both cases was absence of a written record of the trial court's reasons for denying the plaintiffs' discovery requests. *Burns v. Thiokol Chemical Corp.*, 483 F.2d at 304; *Trevino v. Celanese Corp.*, 701 F.2d at 406. Moreover, neither case involved untimely discovery requests or the plaintiff's failure to comply with the trial orders regarding discovery. Finally, the opinions indicate that the plaintiffs in those cases were denied all access to the information they needed to conduct their statistical analyses. *Id.* Therefore, those cases are distinguishable from the present case in which the court of appeals specifically found that the petitioner had ample discovery and information to conduct extensive statistical analysis of the salaries paid ECSU faculty. Therefore, the Fifth Circuit's decisions in *Burns* and *Trevino* are not inconsistent with the Fourth Circuit's decision in this case.

Both *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1362 (9th Cir. 1985) and *Weahkee v. Norton*, 621 F.2d 1080, 1082 (10th Cir. 1980) involved cases where the plaintiff was denied all access to the defendants' employment data. In *Weahkee v. Norton*, 621 F.2d at 1083, the Tenth Circuit specifically found that the failure to provide the plaintiff with the relevant discovery was not shown to be harmless. Of course, in the case at bar the fact that the respondents did provide the petitioner with substantial employment data led the Fourth Circuit to hold to the contrary. Furthermore, there is no indication in either *Diaz* or *Weahkee* that the plaintiffs had failed to comply with the trial court's orders on discovery. Consequently, neither the Ninth Circuit's decision in *Diaz* nor the Tenth Circuit's decision in *Weahkee* conflicts with the Fourth Circuit's decision in this case. Absent such a conflict this issue does not merit the Court's review.

III. WHETHER THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE TRIAL COURT'S DECISION TO EXCLUDE THE PLAINTIFF'S STATISTICAL EVIDENCE ON HER CLAIM AGAINST THE INDIVIDUAL RESPONDENTS UNDER 42 U.S.C. § 1983 IS NOT AN ISSUE WHICH MERITS THIS COURT'S REVIEW.

On May 27, 1980, petitioner filed a charge with the EEOC in which she complained that the respondent ECSU discriminated against her in terms of her salary in violation of her rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. On December 30, 1982, the petitioner filed her complaint in the Eastern District of North Carolina in which she alleged that the institutional respondent ECSU and the individual respondents Dr. Jenkins and Dr. Carson discriminated against her in violation of her rights under Title VII, the fourteenth amendment and 42 U.S.C. § 1983.

In accordance with the 180 day filing requirement set out in 42 U.S.C. § 2000e-5 and North Carolina's three year statute of limitation for actions under 42 U.S.C. § 1983, petitioner was obligated to prove that the paychecks she received no earlier than December 1979 were the product of a deliberately discriminatory decision on the part of Dr. Jenkins or Dr. Carson or were a continuation of a previously discriminatory salary decision by ECSU.

In an attempt to prove that the respondents discriminated against her on the basis of her sex or race when setting her salary, the petitioner offered a statistical study of salaries paid ECSU faculty from the 1971-72 academic year through the 1979-80 academic year. A portion of that study is reproduced in the Appendix to the Petition. The district court sustained the individual respondents' objections to the admission of this evidence and excluded this evidence on the petitioner's § 1983 claim against Dr. Jenkins and Dr. Carson. The district court, however, overruled

ECSU's objection to the statistical study and accepted that evidence on the petitioner's Title VII claim. The court of appeals affirmed that decision.

In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 at 340 (1977), the Court emphasized that statistics "come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." More recently, in *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988), the Court reiterated its concern over the indiscriminate use of statistics. After holding that "the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question [was discriminatory]," *Id.* at 994, the Court noted that, in the absence of any consensus on the proper mathematical standard for determining the legal "significance" or "substantiality" of statistics, the probative value of statistical evidence must be evaluated on a case-by-case basis. *Id.* at 995 n.3.

The statistical evidence petitioner offered at trial did not tend to prove that either Dr. Jenkins or Dr. Carson deliberately discriminated against her in setting her salary for the 1979-80 academic year. Petitioner's statistical expert, testified that a P value of 0.05, or two standard deviations is the conventional cut off for statistical significance. The Fourth Circuit, however, has generally cautioned lower courts against drawing any legal conclusions from standard deviations in the range of one to three. *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 647-48 (4th Cir. 1983); *Moultrie v. Martin*, 690 F.2d 1079, 1082-83 (4th Cir. 1982); *EEOC v. American National Bank*, 652 F.2d 1176, 1192 (4th Cir. 1981). This rule is consistent with the Court's discussion of statistical significance in *Watson v. Fort Worth Bank and Trust*, 487 U.S. at 995 n.3.

Petitioner's evidence showed that there was no statistically significant difference at the level of two standard deviations between the salaries paid Asians and Blacks during the years 1978-79 or 1979-80. (App. 23, 33, 38, 70 and 71). Furthermore, the statistical analysis of petitioner's actual salary showed that it was never more than two standard errors lower than that for a theoretically, similarly situated Black faculty member. (App. 72). In fact, the evidence showed that for the years 1978-79 and 1979-80 petitioner's salary was only 0.24 and 0.19 standard errors lower than that for a theoretically, similarly situated Black faculty member. (App. 72). Obviously, this evidence did not tend to prove that Dr. Jenkins or Dr. Carson discriminated against petitioner on grounds of her race or national origin when setting her salary during the 1979-80 academic year.

Petitioner's study did indicate that there was a statistically significant difference between the salaries paid Asians and Blacks during the years 1973-74 through 1977-78 (App. 65-69) and a statistically significant difference between the salaries paid non-Blacks and Blacks during the years 1972-73 through 1977-78 and 1979-80. (App. 64). These figures, however, were based on the salaries paid all the faculty at ESCU. Petitioner made no attempt to present a statistical analysis of salaries paid faculty in the Department of Business and Economics.

This evidence was plainly irrelevant to petitioner's claim against Dr. Carson. Dr. Carson was appointed chairman of the Department of Business and Economics in 1977. (App. 23). He testified that his only responsibility for salaries was to make recommendations for merit raises for faculty in the Department in accordance with the budget appropriations. Consequently, any evidence of discrimination based on salaries paid faculty outside the Department of Business and Economics or paid faculty before

the time Dr. Carson became chairperson was irrelevant to petitioner's claims against Dr. Carson and unduly prejudicial to his defense.

The evidence showed that Dr. Jenkins became ECSU Vice Chancellor for Academic Affairs in July 1977. (App. 23) There is no evidence of the exact role he played in setting salaries in that year, or indeed, in any subsequent year. Dr. Carson testified that as department head he recommended salaries which were subject to administrative approval. If that testimony is extrapolated to the other academic departments, at most the record shows that as Vice Chancellor Dr. Jenkins was responsible for reviewing the departmental recommendations for salary increases. Consequently, evidence of a statistically significant disparity between the salaries paid all Asians and Blacks during the year 1977-78 does not indicate that Dr. Jenkins was personally motivated to discriminate against Asians.

Furthermore, petitioner had the burden of proving that Dr. Jenkins discriminated against her in terms of her salary during the year 1979-80. Evidence of racial discrimination in overall salaries in the year 1977-78 is not particularly probative on that issue. The probative value of this evidence becomes even more attenuated when one considers that after Dr. Jenkins became Vice Chancellor the salary differential between Asians and Blacks became statistically insignificant. (App. 70 and 71).

The statistical evidence did show that there was a significant difference at the three standard deviation level between the salaries paid Blacks and non-Blacks during the year 1979-80. (App. 64 and 71). The court of appeals, however, discounted this evidence on grounds that statistical disparities in the range of one to three standard deviations are not necessarily legally sufficient to create an inference of discrimination. (App. 21 n.6).

Despite this evidence, the petitioner claims that the lower courts erred when they found the statistical evidence regarding the disparities between salaries paid Blacks and non-Blacks was not relevant to her claim that she had been discriminated against because she was Asian. The petitioner's argument ignores the fact that the statistical evidence regarding the relative salaries paid Blacks and Asians and relative salary paid petitioner and a hypothetically, similarly situated Black faculty member failed to support her claim of discriminatory treatment. (App. 21 n.6 and 23 n.9).

The decision to admit expert statistical evidence lies within the sound discretion of the trial judge and should not be disturbed on appeal absent proof of abuse of that discretion. *Herold v. Hajoca Corp.*, 864 F.2d 317, 321 (4th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 3159, 104 L. Ed. 2d 1022 (1989); App. 24. In exercising that discretion the trial court may consider not only the probative value of the proffered evidence but also its tendency to confuse the jury. *Id.* at 322; Fed. R. Evid. 403. In light of the Court's admonition to consider the value of statistical evidence on a case-by-case basis, the fact that the statistical disparities in salaries paid Blacks and Asians were not legally significant during the relevant period, the fact that the statistical disparities in salaries paid Blacks and non-Blacks were not legally significant during the relevant period, and the statistical evidence regarding the petitioner's salary relative to a hypothetically, similarly situated Black faculty member, the district court did not abuse its discretion when it excluded the petitioner's statistical evidence on the § 1983 claims against Dr. Jenkins and Dr. Carson.

IV. THE PETITIONER'S CLAIM THAT THE LOWER COURTS DID NOT PROPERLY CONSIDER ALL THE EVIDENCE IN THIS CASE IS NOT AN ISSUE WHICH MERITS THIS COURT'S REVIEW.

The petitioner contends that the lower courts did not properly consider all the evidence of discrimination in the record and, therefore, they erred when they found that she failed to establish a prima facie case of race discrimination under either Title VII or § 1983. The petitioner's argument on this point ignores two crucial facts: (1) in order to prevail on any of her claims, she had to prove that the respondents discriminated against her in terms of her compensation during or after December 1979; and (2) in order to prove her § 1983 claims against Dr. Jenkins and Dr. Carson, she had to prove that they personally and intentionally denied her a higher salary because of her race after December 1979.

As noted above, the petitioner filed her EEOC charge in May 1980 and filed her complaint in December 1982. 42 U.S.C. § 2000e-5 requires persons alleging discrimination to file a charge with the EEOC within 180 days of the alleged discriminatory act. Under North Carolina law, plaintiffs must bring actions alleging violations of § 1983 within three years of the discriminatory action. N.C. Gen. Stat. § 1-52(5)(three year limitation on actions for "criminal conversion, or for any other injury to the personal rights of another, not arising on contract and not hereafter enumerated"; *Owens v. Okure*, 488 U.S. 235 (1989)(state's general or residual statute of limitation for personal injury actions applies to claims under § 1983). Consequently, petitioner was obligated to prove that the paychecks she received no earlier than December 1979 were the product of a deliberately discriminatory decision on the part of Dr. Jenkins or Dr. Carson or were a continuation of a previous discriminatory salary decision by ECSU. *See, United Air Lines v. Evans*, 431 U.S. 571 (1977)(female flight attendants who could not prove a discriminatory act within the requisite filing

period not entitled to relief even though effects of prior discriminatory discharges were perpetuated through the enforcement of a nondiscriminatory seniority system); *see also, Bazemore v. Friday*, 478 U.S. 385, 387 n.1 and 396 n.6 (1986)(victims of historically discriminatory salary schedules entitled to recover only if they can prove that discriminatory salary structure continued to a time within the applicable statute of limitations).

As the respondents have shown above, the statistical evidence was insufficient to create an inference that the respondents intentionally discriminated against the petitioner when setting her salary for December 1979. Furthermore, the petitioner failed to present evidence that any substantially similarly qualified Black faculty member was paid more than she was paid during or after December 1979.

The petitioner's testimony that Dr. Carson had told her that the "general policy of the administration is that they are going to get rid of all the Asians who are here at present" is neither an admission that Dr. Carson or Dr. Jenkins was personally involved in any effort to remove Asians from the ESCU faculty nor evidence that anyone was discriminating against Asian faculty in terms of their salaries. Furthermore, the record shows that after he became chairman Dr. Carson recommended the employment of two Asian faculty, Dr. Nizami and Dr. Naz, and recommended tenure for Dr. Naz and another Asian faculty member, Mr. Hafiz. Dr. Jenkins approved those recommendations and those Asians were hired and tenured. Finally, the record shows that the two highest paid regular faculty in petitioner's department were Dr. Nizami and Mr. Hafiz, both of whom were Asians.

The petitioner complains that the court of appeals did not give any consideration to evidence that, despite the fact that her husband, who was chairman of the Department of Biology, recommended the employment of Dr. Malik, an Asian, for a vacant position in the Department of Biology, Dr. Jenkins hired Dr. Lewis, a Black. The record, however, shows that Dr. Jenkins

hired Dr. Lewis only after Dr. Malik refused his offer to come to ECSU because he wanted more money. Although Dr. Lewis was employed at a salary higher than that advertised, there is no evidence in the record that Dr. Malik was not offered the same salary or that Dr. Malik would have accepted the position at the salary offered Dr. Lewis. Consequently, the evidence on this point also fails to create an inference of discrimination.

The petitioner claims that evidence that Evelyn Roberts, a Black faculty member in the Business and Economics Department, was promoted from Instructor to Assistant Professor while petitioner was denied a similar promotion proves that the respondents discriminated against her because of her race. The record, however, shows that after being hired Ms. Roberts attended the University of North Carolina at Greensboro, an accredited institution, where she completed thirty semester hours of study beyond her masters degree. (App. 19). After completing those courses in the summer of 1979, Ms. Roberts satisfied the minimum requirements for promotion and was promoted to Assistant Professor. (App. 6-7 and 19).

Ms. Roberts' record stands in sharp contrast with petitioner's. During the time she was employed at ECSU, the petitioner did not attend an accredited institution and made no effort to continue her education until 1976 when she enrolled in an unaccredited, correspondence Ph. D. program at California Western University. (App. 7). While enrolled in California Western University, Ms. Khan did not take thirty semester hours of study and, in fact, received academic credit for her "life experiences." (App. 7). Furthermore, Ms. Khan failed to provide the ECSU administration with an official transcript of her studies at California Western University until after she left ECSU. (App. 7). Without thirty semester hours of study beyond the masters degree, Ms. Khan did not qualify for promotion. (App. 6-7). Therefore, the fact that Ms. Roberts was promoted, while the petitioner was not, fails to raise an inference that the respondents discriminated against the petitioner because of her race.

Finally, the petitioner contends that the disparate treatment of Venus Deonanan, a Black faculty member, shows that Dr. Jenkins discriminated against her because of her race. Dr. Deonanan, who was not in the Business and Economics Department, was promoted from Instructor to Assistant Professor after attending Union Graduate University, an unaccredited graduate school. Union Graduate University was, however, a candidate for accreditation. The record also shows that candidacy status was a significant factor which distinguished Union Graduate University from institutions which were not candidates for accreditation. Furthermore, the record shows that Dr. Deonanan was promoted prior to the time Dr. Jenkins became Vice Chancellor and he played no role in that decision. Therefore, the decision to promote Dr. Deonanan does not raise an inference that any of the respondents discriminated against the petitioner.

Dr. Jenkins' subsequent decision to recommend Dr. Deonanan for tenure was based on the recommendation of her department chairman. Dr. Jenkins never received a recommendation that petitioner be tenured. Therefore, evidence regarding Dr. Deonanan's employment history fails to raise any inference of discrimination on the part of Dr. Jenkins and entirely fails to raise any inference that any respondent discriminated against the petitioner in terms of her salary.

When considered in its entirety, the evidence in the record fails to create a substantial probability that any of the respondents discriminated against the petitioner when setting her salary during the relevant period. Furthermore, a reading of the court of appeals' decision shows that it reviewed the evidence under the appropriate legal standards. The petitioner's disagreement with the lower courts' reading of the record does not raise a special or important issue that merits this court's review.

CONCLUSION

Insofar as the petitioner has failed to show that the decision below is in conflict with any applicable decision of this Court or any other circuit and has failed to show any other special or important reason for granting a writ of certiorari in this case, the respondents respectfully request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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